82-1989

No.

In the Supreme Court of the United States

October Term, 1982

THE HONORABLE BENNETT H. BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,

Petitioners,

vs.

STATE OF FLORIDA, ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY d b a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, and ARMANDO MERINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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June 1, 1983

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Florida Supreme Court to prohibit Florida public defenders from filing any class action suits on behalf of their clients violates the rights to independent counsel and access to courts guaranteed indigents by the Sixth and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the Supreme Court of Florida:

Relators

The State of Florida

Jim Smith, Attorney General of the State of Florida

Public Health Trust of Dade County [Florida] doing business as Jackson Memorial Hospital

Thomas J. Kelly
Josephina Perez
James Sussex
Armando Merino,

Employees of Public Health Trust of Dade County d/b/a Jackson Memorial Hospital

Respondents

The Honorable Bennett H. Brummer,

Public Defender of the Eleventh Judicial Circuit Court of Florida (Dade County)

Barry Weinstein,
William Ploss,

Assistant Public Defenders of the Eleventh Judicial Circuit Court of Florida

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OPINION IN THE COURT BELOW

The opinion of the Supreme Court of Florida appears at 426 So.2d 532 (Fla. December 16, 1982; rehearing denied, March 3, 1983) and is reproduced at A. 1-4.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on December 16, 1982. A Motion for Rehearing or Clarification of Decision was timely filed 15 days later on January 3, 1983 pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure (A. 118-123), which motion was denied by the Supreme Court of Florida on March 3, 1983. (A. 1, 5). This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws."

Title 42, § 1983 of the United States Code provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privi-

leges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 23 of the Federal Rules of Civil Procedure provides, in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards or conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive re-

lief or corresponding declaratory relief with respect to the class as a whole. . . ."

Article V, § 3(b)(8) of the Florida Constitution provides:

"The Supreme Court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."

Fla. Stat. § 27.51 provides, in part:

"(1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent . . . and who is:

(a) Under arrest for, or is charged with, a felony;

(b) Under arrest for, or is charged with, a misdemeanor, a violation of chapter 316 which is punishable by imprisonment, or a violation of a municipal or county ordinance in the county court, unless the court, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if he is convicted;

(c) Alleged to be a delinquent child pursuant to a petition filed before a circuit court; or

(d) Sought by petition filed in such court to be involuntarily hospitalized as a mentally ill or mentally retarded person.

* * *

(3) Each public defender shall serve on a full-time basis and is prohibited from engaging in the private practice of law while holding office. . . .

DR 5-107(B), CODE OF PROFESSIONAL RESPONSIBILITY, provides:

"A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

STATEMENT OF THE CASE

In this case, the Attorney General of the State of Florida responded to the filing of a federal class action suit by the Public Defender for the Eleventh Judicial Circuit of Florida (the "Public Defender")[1] by seeking and obtaining from the Florida Supreme Court the issuance of a writ of *quo warranto* imposing a *per se* ban on the filing of class actions on behalf of indigents in any court by Florida public defenders. This action to review that decision is brought in this Court as a petition for writ of certiorari to the Florida Supreme Court, rather than as an appeal, because the Petitioners have contended throughout the course of this litigation that no Florida statute prohibits their filing appropriate class action suits on behalf of named plaintiffs they have been appointed to represent and all similarly situated persons. Because the Florida Supreme Court's purported construction of wholly unspecified statutory provisions to prohibit such actions is itself erroneous, as well as unconstitutional, no Florida statute has been drawn into question and no appeal lies.

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1. Petitioner The Honorable Bennett H. Brummer is the Public Defender of the Eleventh Judicial Circuit of Florida, which is comprised exclusively of Dade County, Florida. Petitioners Barry Weinstein and William Ploss are Assistant Public Defenders of the Eleventh Judicial Circuit of Florida. All three are collectively referred to herein as the "Public Defender" or the "Public Defender's Office." Respondents are the State of Florida, Florida Attorney General Jim Smith (the "Attorney General"), the Public Health Trust of Dade County doing business as Jackson Memorial Hospital, and the following employees of the Public Health Trust of Dade County d/b/a Jackson Memorial Hospital: Thomas J. Kelly, Josephina Perez, James Sussex, and Armando Merino. Respondents are referred to herein either individually, or collectively as "the State" or "Respondents."

A. The Involuntary Commitment Proceeding

On September 17, 1980, "G.A.", a 17-year-old minor indigent was, at the request of his mother, voluntarily admitted for psychological and psychiatric treatment to the Adolescent Unit of Jackson Memorial Hospital (the "facility") which is operated by Respondent Public Health Trust of Dade County. (A. 18). While in the "care" of the facility, G.A. was subjected to a "treatment" program characterized by an independent psychiatrist as utilizing

> a form of adverse conditioning and punitive sanctions . . . [which lack] any discernable standards or reason . . . that would medically and psychiatrically justify their application to G.A.

(A. 46). Pursuant to this program, G.A. was (i) required to ingest powerful mind-altering drugs without his consent or that of his guardian in violation of Florida law, (ii) forced to sleep in the halls of the facility on only a mattress, (iii) denied any opportunity for exercise or access to sunlight and fresh air, (iv) placed in solitary confinement for prolonged periods of time, (v) absolutely prohibited from communicating with his friends or mother, (vi) confined for more than six days with no one other than a psychotic adult male who spoke only Spanish, and (vii) made to sit and stare at a wall for long periods of time. (A. 45-46). Consequently, G.A. and his mother sought his discharge from the facility. (A. 18).

On September 29, 1980, the medical staff at the facility responded to this request for release by initiating involuntary commitment proceedings against G.A. Florida law provides that a person may be confined to a mental institution "if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or

2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being."

Fla. Stat. § 394.467(1)(b) [1981]. Thus, the only issues material to an involuntary commitment proceeding are (a) whether the individual is of such a mental state that he would be dangerous to himself or others and (b) whether he is in need of supervised treatment. In accordance with Fla. Stat. § 394.467(2) [1981],[2] G.A. was temporarily confined against his will pending a hearing to determine whether he should be involuntarily committed. (A. 18).

Three days after the State had instituted proceedings, the Public Defender was appointed by the State to represent G.A. pursuant to Fla. Stat. § 27.51(1)(d), which provides in relevant part that "[T]he public defender shall represent any person who is determined by the court to be indigent . . . and who is . . . [s]ought by petition filed in such court to be involuntarily hospitalized. . . ." (A. 45).

Shortly following his appointment, the Public Defender was advised by the independent psychiatrist that it was likely that G.A. would be involuntarily committed at the upcoming proceeding unless his "treatment" program was terminated. (A. 45-46). The psychiatrist opined that "the conditions under which G.A. was confined were contributing to G.A.'s poor mental state" and that the ad-

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2. Fla. Stat. § 394.467 was substantially rewritten by the Florida Legislature in 1982. *See* Fla. Stat. § 394.467 (1982 Supp.). However, this revision did not become effective until October 1, 1982.

ministration of this treatment would "lead to his continued confinement under the Baker Act."[3] (A. 46).

B. The Decision To Bring The Class Action Suit

At this point the Public Defender was obligated to exercise his independent professional judgment as to how his office should represent G.A. Since the psychiatrist had informed the Public Defender that the psychological "treatment" to which G.A. was being subjected by the State could itself lead to development of a mental state necessitating involuntary commitment, the Public Defender could not limit his representation of G.A. to an appearance at a future involuntary commitment hearing. Such legal representation would be "too little, too late" because the issue at the hearing would be G.A.'s current mental state—not whether his "treatment" had reduced him to that state—and by the time the hearing occurred the "treatment" might well have caused irreparable damage to G.A.'s mental health. In addition, the Public Defender determined that confining G.A. under conditions posing a threat to his future liberty itself violated G.A.'s constitutional rights. (A. 51-52, 78).[4]

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3. Fla. Stat. §§ 394.451 through 394.4785 govern care and treatment of the mentally ill in Florida, including involuntary civil commitment. Pursuant to Fla. Stat. § 394.451, these provisions "shall be known as 'The Florida Mental Health Act' or 'The Baker Act.'"

4. In the judgment of the Public Defender, the conditions of G.A.'s confinement violated his rights under the First, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. (A. 20). The significant liberty interest of the individual in circumstances such as G.A.'s has recently been reaffirmed by this Court:

> This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.

(Continued on following page)

The Public Defender had also to take into account the severely limited resources available to his Office, the fundamental need to allocate his resources among various priorities, the fact that he had represented many other persons threatened with involuntary commitment in the past, and, finally, the existence of the statutory provision requiring his office to represent in the future all indigents facing involuntary commitment. (A. 47-50, 51-52). Moreover, it was the professional judgment of the Public Defender that he was more likely to obtain from the State the relief he sought for G.A. if he filed the suit as a class action claim. (A. 50, 52). Such a suit would force the State to review the entire treatment program of the facility, rather than simply to regard the case as relating to G.A.'s need for confinement. In short, the class action suit would force the State to take the case seriously and would timely place at issue the etiology of G.A.'s condition, thus opening the door for institutional reform.

Consequently, to ensure the protection of G.A.'s rights and in the exercise of his independent professional judgment, the Public Defender filed a class action suit in federal court pursuant to 42 U.S.C. § 1983 and Rule 23(b) of the Federal Rules of Civil Procedure on behalf of G.A. and all similarly situated persons (a copy of the Complaint in this federal civil rights action is reproduced at A. 158-174) to halt the use of "treatment" at the facility which would only increase the likelihood of involuntary commitment. (A. 51-52, 78). The Public Defender believed this tactical decision would increase both the likelihood of obtaining

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Footnote continued—

Addington v. Texas, 441 U.S. 418, 425 (1979). *See also Shuman v. State*, 358 So.2d 1333, 1335 (Fla. 1978) (recognizing that persons confined pursuant to involuntary commitment proceedings must be afforded same access to courts as persons confined pursuant to criminal charges).

relief for G.A. and the possibility of helping other similarly-situated past and future clients of the Public Defender. (A. 50, 52).

C. The Petition For A Writ Of Quo Warranto To Prohibit The Class Action Suit

The State of Florida, through the Respondent Attorney General, opposed the certification of the plaintiff class in the federal suit. Not content, however, to allow the certification question to be resolved by the federal court, the Attorney General took the unprecedented step of filing in the Florida Supreme Court an entirely independent action, a Petition for a Writ of *Quo Warranto* (the "*Quo Warranto* Petition") (A. 6-17), invoking that court's original jurisdiction and seeking to divest the Public Defender of his "authority to represent the plaintiffs in [the pending class action]".[5] The Attorney General argued that the Public Defender should be prohibited from bringing the class action because:

> The office of Public Defender . . . is a creature of Article V, § 18, Florida Constitution, with no authority outside of that provided by statute.

(A. 9). The Petition claimed that since Fla. Stat. § 27.51 does not specifically provide that the Public Defender is authorized to file any class actions, the Public Defender lacked such authority and was subject to an Order from the court halting such representation:

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5. Article V, Section 3(b)(8) of the Florida Constitution grants the Florida Supreme Court jurisdiction to issue writs of *quo warranto*. The *quo warranto* proceeding is employed where it is charged that an individual officer is performing duties that he does not have the authority to perform. *Quo Warranto* is an extraordinary remedy, to be granted or refused only "as the circumstances and the interests of the public require." 27 *Fla. Jur., Quo Warranto* § 11.

> The authority to proceed in a particular way only upon specific conditions implies a duty not to proceed in any manner other than that which is authorized by law.

(A. 10).

The Attorney General further argued that Petitioners were "exceeding their authority in several respects" (A. 11) by, among other things, filing any civil action and filing any federal action. (A. 11-13).

D. The Response To The Petition

The Public Defender initially offered three fundamental arguments in response to the Petition. First, he argued that Fla. Stat. § 27.51 in no way prohibits the filing of class action suits by public defenders. Uncontradicted affidavits from members of the Public Defender's Office stated that the Office had filed federal civil rights class actions in the past without objection from the State, listing by official style and case number some of those actions. (A. 23-24, 47-51). One of these cases reached this Court and was decided on the merits. *Gerstein v. Pugh*, 420 U.S. 103 (1975). In fact, the affidavits noted that the Public Defender had received and used federal grant money in the past for just this purpose. (A. 53-54). Neither the literal language of Fla. Stat. § 27.51, nor its fair implications, had ever been construed to bar the filing of appropriate class action suits in either state or federal court. (A. 24-32). Second, the Response asserted that constitutional, statutory, and ethical provisions require that the Public Defender be permitted to bring actions which in his judgment are necessary to effectively protect the rights of his clients. (A. 24). With respect to his ethical duties to his clients, the Response noted, the Public Defender is under the same obligations to his client as is a private attorney. (A. 35-37). Finally, the Response

argued that a prohibition against the Public Defender's use of appropriate class action suits would violate indigents' right of access to the courts under the United States Constitution. (A. 32-35).

Subsequent to the Response, this Court decided *Polk County v. Dodson*, 454 U.S. 312 (1981), and the Public Defender's Office timely filed supplemental papers explicating its second federal claim: State prohibition of class action suits brought by public defenders would violate Florida indigents' federal right to independent counsel by constituting direct State interference with the independent exercise of the Public Defender's professional judgment and would amount to state control of his tactical decisions. (A. 124-157).

Thus, the federal questions presented here were properly raised below (A. 32-35; A. 124-157), as is evident from the opinion of the Florida Supreme Court itself. (*See infra* at 12-13; A. 3-4).[6]

E. The Decision Of The Florida Supreme Court

On December 16, 1982, the Florida Supreme Court issued its opinion holding that a writ of *quo warranto* should be issued "divesting [the Public Defender] of the authority to represent [G.A. and those persons similarly

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6. The Public Defender here has standing to assert the Sixth and Fourteenth Amendment rights of G.A. and all other indigents. "Just as a litigant should always have standing to claim that he is being penalized for asserting his own constitutional rights, a litigant's claim that complying with a duty imposed upon him would prevent another from exercising a constitutional right presents a clearly justiciable issue about the permissibility of the choice government seeks to impose upon the litigant." L. Tribe, American Constitutional Law 104 (1978); *see Craig v. Boren*, 429 U.S. 190, 195 (1976) (beer vendor has standing to assert right of male beer buyers because compliance with legal duty would "result indirectly in the violation of third parties' rights"); *see also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distributor of contraceptives has standing to assert right of unmarried users).

situated] in a class action." (A. 3). Construing Fla. Stat. § 27.51 narrowly, the court specifically held that a public defender "cannot undertake representation of a class." (A. 3). Tactical considerations could not, according to the Florida court, make up for the Public Defender's lack of explicit statutory authority to initiate class action suits. (A. 3). Although the court noted the *Polk County v. Dodson* decision, it did not respond to that decision's characterization of the Public Defender as an independent practitioner free of state control. (A. 4). Following the denial of a petition for rehearing, proceedings have been timely initiated in this Court. (A. 1, 5).[7] This Petition for Writ of Certiorari requests review of the issuance of the Writ of *Quo Warranto* by the Florida Supreme Court which was sought and secured by the Attorney General of the State of Florida.

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7. Although G.A., the named plaintiff in the federal class action brought by the Public Defender, was eventually released from Jackson Memorial Hospital on a writ of *habeas corpus,* this case is not moot for two reasons:

First, the dispute between G.A. and Respondents is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). In fact, subsequent to G.A.'s release, a second involuntary commitment proceeding was brought against him by the State of Florida. (A. 73-77). Although G.A. escaped from Respondents' custody prior to this second commitment hearing (A. 22) (which the state dismissed), the State of Florida still remains free to bring another commitment proceeding against G.A.

Second, even if this case were moot with respect to G.A., it would not be moot as to the other members of the class for the reasons set forth in *Sosna v. Iowa,* 419 U.S. 393, 399-400 (1975) (holding that claims of unnamed members of the class continued to present a live controversy which outlasted the mootness of the named representative's claim); *Gerstein v. Pugh, supra* at 110 n.11. Although the class in *Sosna* had been certified by the district court, the fact that such certification is not present here does not moot the claims of unnamed class members, since their ability to litigate the issue of class representation through the Public Defender has been ended by the granting of the *Quo Warranto* Petition.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Florida Supreme Court To Prohibit Public Defenders From Filing Class Action Suits Conflicts With Decisions Of This Court Guaranteeing Indigents' Rights To Effective, Independent Counsel And Access To The Courts.

A. The Decisions Of This Court Explicitly Hold That The Right To Counsel Guaranteed By The Sixth And Fourteenth Amendments Requires Counsel To Be Independent Of State Control.

Less than two years ago, in *Polk County v. Dodson, supra* ("*Polk County*"), this Court reaffirmed "the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." 454 U.S. at 321-22. In an opinion joined by eight Justices, the Court observed that "implicit" in the right to counsel guaranteed by the Fourteenth Amendment "is the assumption that counsel will be free of state control." *Id.* Following principles established by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny, this Court flatly held that "[T]here can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.* As the Chief Justice wrote concurring, in establishing a public defender's office the state provides "a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial." *Id.* at 327.

In *Polk County*, this Court explicitly held that "a public defender is not amenable to administrative direction

in the same sense as other employees of the State." *Id.* at 321. A "defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior . . ." because he is "held to the same standards of competence and integrity as a private lawyer . . .", and these standards require that he "work under canons of professional responsibility that mandate his exercise of independent judgment on behalf of his client." *Id.* In so holding, this Court was following the mandate of Disciplinary Rule 5-107(B), ABA Code of Professional Responsibility (1976) and the explicit language of *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), which states: "the primary office performed by appointed counsel parallels the office of privately retained counsel. . . . Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

The right to counsel means the right to an attorney who is independent of tactical control by the State. Anything less would render this great guarantee meaningless.

B. The Decision Of The Florida Supreme Court To Prohibit Public Defenders From Filing Class Action Suits Inherently Conflicts With The Right Of Florida Indigents To Counsel Independent Of State Control.

In exercising his independent professional judgment, the Public Defender in the case at bar made the tactical decision that the appropriate tool to employ in representing his duly appointed client would be a federal class action suit to halt the "treatment" being administered to him and all similarly situated persons. The class action was chosen because it was the appropriate procedural vehicle for enjoining the "treatment" that was rapidly worsening

his client's condition and seriously endangering his client's ability to maintain the mental state necessary to avoid involuntary commitment; further, it provided the only means for efficiently allocating the limited resources of the Public Defender's office, resources which the Public Defender had to employ wisely if his future clients were going to receive the representation that was their constitutional due and if G.A. himself was to be assured adequate protection of his rights. Moreover, the Public Defender chose this tactical approach because he believed it was more likely to obtain from the State the relief his client required.

The decision of the Florida Supreme Court to prohibit public defenders from bringing any class action suits constitutes a clear violation of "the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Polk County*, at 321-22. The Florida Supreme Court reasoned that the public defender is strictly a "statutory creature" and may employ only such tactics as are authorized by statute. That Court did not contend that any statutory provision specifically prohibited the initiation of a class action suit by the Public Defender;[8] instead, it held that the "Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any additional persons. He therefore cannot undertake representation of a class." (A. 3). The court opined that "the mere fact that a decision is tactical is of no import. Invariably

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8. Chapter 27 of the Florida Statutes contains no such prohibition. The position of the State was based on the statutory provisions limiting the Public Defender's "duties" only to indigents he has been appointed to represent (A. 10, 15); Fla. Stat. § 27.51(1).

the respondents must still have the authority to act and here they simply do not." (A. 3).

This decision is especially disturbing when viewed in the context of the circumstances presented here. The named plaintiff was an indigent whom the Public Defender had been duly appointed to represent and whom the Public Defender was required to represent. The Public Defender was therefore appearing in the federal civil rights action to protect substantive rights guaranteed the class by the United States Constitution. Moreover, the Florida Supreme Court's prohibition was issued at the behest of the Attorney General, the highest legal officer of the Public Defender's traditional opponent, and was the result of a *Quo Warranto* Petition filed to prevent the Public Defender from continuing with a specific federal class action suit against the State. The Attorney General contended in his Petition, and the Florida Supreme Court agreed, that "the office of Public Defender . . . is a creature of Article V, § 18, Florida Constitution, with no authority outside of that provided by statute" and that "the authority of a Public Defender is defined and limited by statute . . . ." (A. 9). Since the relevant Florida Statutes do not specifically authorize the filing of any class action suits by the Public Defender, the Attorney General argued and the Florida Supreme Court held such suits may not be filed even where, in the independent professional judgment of the Public Defender, filing such a suit is proper or necessary. Thus, the *Quo Warranto* Petition was a direct attempt by the State to control, and restrict the tactical decisions of the Public Defender litigating against the State, and it has so far succeeded.

The decision of the Florida Supreme Court conflicts with the decisions of this Court construing the right to counsel secured for indigents under the Sixth and Four-

teenth Amendments because it does not respect and preserve from state control the independent professional judgment of the Public Defender. It does not permit him to represent indigents using the same procedural tactics that a private attorney would employ in representing his clients. It reduces him to a "statutory creature" and his representation to activity that must be explicitly authorized by statute. It constituted invasion and control of his tactical judgment by the Attorney General through the issuance of a Writ of *Quo Warranto* halting a specific class action against the state and absolutely prohibiting the filing of any future class action suits by Florida public defenders. This decision is contrary to this Court's holdings: the State may not control the otherwise legitimate litigation tactics of the Public Defender by absolutely withholding from the stock of tactical options available to him in serving his indigent clients those legitimate litigation tools a private attorney would use in representing his indigent or nonindigent clients.

C. The Decision Of The Florida Supreme Court To Prohibit Public Defenders' Class Action Suits Conflicts With Decisions Of This Court Which Guarantee Indigents The Right To Meaningful Access To The Courts.

The Public Defender's Office enjoys the benefit of only limited resources (which are themselves controlled by the State); consequently, the Florida Supreme Court's decision to deprive the Public Defender of the most efficient means of adjudicating the claims of large groups of indigents poses a serious threat that some indigents who qualify for representation by the Public Defender may not receive adequate legal assistance, or any representation at all. Thus, the decision would infringe their rights to

effective assistance of counsel and meaningful access to the courts. Under these circumstances, the decision of the Florida Supreme Court is in clear conflict with decisions of this Court.

The Florida Supreme Court decision conflicts with a line of this Court's decisions which ". . . have consistently required States to shoulder affirmative obligations to assure all prisoners *meaningful access to the courts.*" *Bounds v. Smith,* 430 U.S. 817, 824 (1977) (emphasis added). *Accord, Johnson v. Avery,* 393 U.S. 483 (1969); *Wolff v. McDonnell,* 418 U.S. 539, 577-80 (1974). In *Bounds v. Smith, supra* at 430 U.S. 828 & n.17, this Court held that the fundamental right of access to the courts required prison authorities in the State of North Carolina to provide inmates with law libraries or trained personnel necessary for the effective litigation of their federal civil rights actions. In *Wolff v. McDonnell, supra* at 577-80, this Court unanimously held that Nebraska prison authorities were constitutionally required to provide inmates with legal assistance for the preparation of federal civil rights actions, noting the importance of actions under 42 U.S.C. § 1983 to those confined pursuant to state authority.

Here, the Florida Supreme Court has gone much further in denying access to the courts than did either North Carolina or Nebraska. To allow the State to define by statute the persons the Public Defender must represent, to limit by appropriations the resources he has available to conduct this representation, to restrict by writ the legal tactics he may use in representing his clients, affords too much power to the State. It threatens to place an intolerable obstacle in the path of indigents seeking meaningful access to the courts through an effective, independent counsel. This threat has become reality in this case. Florida has allocated only limited resources to the Public

Defender, has required him to represent certain statutory classes of persons defined by statute (including indigents threatened with involuntary commitment), and now would prohibit his use of class actions which he needs to litigate effectively the claims of large classes of indigents.

The class action device is of special significance when federal civil rights are at stake. Since class representation makes it easier to bring claims on behalf of large numbers of indigents which would otherwise be too expensive to bring on an "individual" basis, the class action device insures the fulfillment of national policy as set forth in 42 U.S.C. § 1983 and similar statutes. Moreover, the presence before it of a class with similar claims forces the court to more carefully consider the scope and implications of its decision, and forces the institutional defendant to confront the institutional causes of those claims in a single setting. *See, Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1353 (1976). Indeed, the federal courts have recognized the special importance of class actions in civil rights cases and have accordingly made less strict the class certification standard for such claims, realizing that such suits under Rule 23(b)(2) are particularly tailored to permit "the assertion of claims by sizable groups seeking redress of social wrongs". Yeazell, *Interest, Class, and Representation*, 27 UCLA L.Rev. 1067, 1114-1115 (1980). Despite this clear federal policy in favor of civil rights class actions and the admitted obligation to respect the professional independence of the Public Defender, the Florida Supreme Court has prohibited him from maintaining such actions.

This decision is particularly disturbing where, as here, there can be no question federal rights are at stake. As noted in *Addington v. Texas*, 441 U.S. 418, 425 (1979),

"[t]his Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Accord, Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504, 509 (1972); *Specht v. Patterson,* 386 U.S. 605, 608 (1967). The decision of the Florida Supreme Court to deny indigents the class action remedy under these circumstances warrants the special attention of this Court.

II. Review Of This Case Is Of Fundamental Importance Because All Florida Public Defenders Are Now Prohibited From Filing Class Action Suits On Behalf Of Their Clients.

As the law in Florida now stands, no public defender may bring a class action suit on behalf of his indigent clients. Thus far, Florida is the only state to have construed *Polk County* to allow for this unprecedented interference with the independence of the public defender. The general rule among the states has been one of respect for the professional integrity of the public defender. Almost 40 years ago, in *Ex Parte Hough,* 24 Cal.2d 522, 150 P.2d 448 (1944) the California Supreme Court ruled that

> when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court.

24 Cal.2d at 529, 150 P.2d at 451-52. Courts in both Connecticut and Indiana have reasoned similarly. *See, e.g., Spring v. Constantino,* 168 Conn. 563, 362 A.2d 871 (1975); *State ex rel. Fulton v. Schannen,* 224 Ind. 55, 64 N.E.2d 798

(1946). Only Arizona has allowed the state to interfere in a limited way with the public defenders' representation of indigents, *see State v. Evans*, 129 Ariz. 153, 629 P.2d 989 (1981) (state public defender may not represent indigents seeking post-conviction relief in federal court pursuant to 28 U.S.C. § 2254 where federal court is authorized to appoint counsel), and then only where alternative legal representation was available pursuant to statute in a federal forum.

It is essential that this Court act now to reinstate the authority of Florida public defenders to represent their clients independent of state control and to prevent the adoption by other states of similar violations of the right to independent counsel.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be granted.

DATED: Miami, Florida
May 30, 1983

Respectfully submitted,

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(Counsel of Record)
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STEVEN M. KAMP
PAUL & THOMSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served June 1, 1983, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

Carolyn M. Snurkowski
Assistant Attorney General
Bureau Chief, Miami Division
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

Melinda S. Thornton
Assistant County Attorney
1626 Dade County Courthouse
Miami, Florida, 33131

The Honorable Jim Smith
Attorney General of the State of Florida
The Capitol
Tallahassee, Florida 32304

PARKER D. THOMSON

82-1989

No.

In the Supreme Court of the United States

October Term, 1982

THE HONORABLE BENNETT H. BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,

Petitioners,

vs.

STATE OF FLORIDA, ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY d b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, and ARMANDO MERINO,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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June 1, 1983

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APPENDIX

STATE of Florida ex rel. Jim SMITH, etc., et al., Relators,

v.

Bennett BRUMMER, etc., et al., Respondents.

No. 61376.

Supreme Court of Florida.

Dec. 16, 1982.

Rehearing Denied March 3, 1983.

Relators filed an original proceeding seeking a writ of quo warranto. The Supreme Court, Adkins, J., held that the attorneys appointed to represent a minor in an involuntary commitment proceeding could not file a federal class action alleging violations of constitutional rights and seeking declaratory and injunctive relief; the attorneys, however, were not precluded from seeking relief in federal court on an "individual" basis.

Writ of quo warranto granted.

1. Attorney and Client (Key) 132

Attorneys appointed to represent minor in involuntary commitment proceeding could not represent class represented by minor and minor's mother in federal class action alleging violations of constitutional rights and seeking declaratory and injunctive relief; attorneys, however, were not precluded from their representation in seeking federal relief on "individual" basis.

2. Criminal Law (Key) 641.13(3)

Public defender's principal responsibility is to serve undivided interests of his client; indeed, indispensable ele-

ment of effective performance of his responsibilities is ability to act independently of government and to oppose it in adversary litigation.

Jim Smith, Atty. Gen. and Anthony C. Musto, Asst. Atty. Gen., and Melinda S. Thornton, Asst. County Atty., Dade County, Miami, for relators.

Parker D. Thomson of Paul & Thomson, Miami, for respondents.

ADKINS, Justice.

Respondents were appointed to represent a minor, G.A., in a chapter 394 involuntary commitment proceeding. Although he was committed at the conclusion thereof, G.A. was later ordered released by the Dade County Circuit Court and has remained at liberty ever since.

In addition to respresenting him in the above proceedings, respondents filed suit on behalf of G.A. and all others that were similarly situated in the United States District Court alleging violations of constitutional rights and seeking declaratory and injunctive relief. The suit was instituted by R.A., G.A.'s mother. A motion for class certification was additionally filed as well as a motion for leave to proceed in forma pauperis. The latter motion was initially granted but later, on a motion by the opposing parties was vacated.

Subsequent to the above, G.A. and R.A. filed an amended complaint, seeking damages, in the federal proceeding. That pleading was signed by two of the respondents and by Eugene Zenobi, a private practitioner not employed by the public defender's office. Relators then brought this quo warranto proceeding to challenge respondents' authority to institute the federal proceedings in the form of a class action suit.

It is the petitioners' contention in this case that the public defender is not authorized to bring a class action suit, particularly when there is no showing that each member of the purported class is indigent and when there is no showing that the public defender was ever appointed to represent in any proceeding, any member of the class other than the named plaintiff.

Respondents counter by arguing that the bringing of a class action suit was the most efficient way to represent these individuals with the limited resources of the office of the public defender.

We hold that a writ of quo warranto should be issued by this Court divesting the respondents of the authority to represent the plaintiffs in a class action.

[1] Pursuant to the Supreme Court ruling in *Branti v. Finkel,* 445 U.S. 507, 519, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574 (1980), we understand that "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." The Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any such additional persons. He therefore cannot undertake representation of a class.

Our reasoning in the case at bar parallels that which was used in our decision of *Graham v. State,* 372 So.2d 1363 (Fla.1979). There, we concluded that the state of Florida is under no obligation to provide the counsel or costs in federal proceedings.

The decision to file this federal complaint as a class action suit is said to be a tactical move on the part of the respondents. Respondents have based their decision on the likelihood of obtaining relief for both G.A. and other individuals. The mere fact that a decision is tactical is

of no import. Invariably the respondents must still have the authority to act and here they simply do not.

This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief on an "individual" basis. A lawyer's professional responsibility may dictate this action. It is, however, our view that a state court could not mandate this action.

The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages. The decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "[g]uiding hand of counsel at every step of the proceedings against [them]." *Id.* at 345, 83 S.Ct. at 797 (quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932)).

[2] The United States Supreme Court opinion in *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), concisely summarizes this Court's view concerning the primary purpose of the public defender. Quoting from *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979), the Court agreed that

> His [the public defender's] principal responsibility is to serve the undivided interests of *his* client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

102 S.Ct. at 450 n. 8 (emphasis supplied).

The petition for writ of quo warranto is hereby granted by this Court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

(Filed March 3, 1983)

SUPREME COURT OF FLORIDA

THURSDAY, MARCH 3, 1983

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

Upon consideration of the Motion for Rehearing or Clarification of Decision filed in the above cause by attorney for Respondents,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy
TEST:

TC

cc: Parker D. Thomson, Esquire
Richard J. Ovelmen, Esquire
Steven M. Kamp, Esquire
Anthony C. Musto, Esquire
Mindy Thorton, Esquire

Sid J. White
Clerk, Supreme Court

By: /s/ Tanya Carroll
Deputy Clerk

(Filed November 6, 1981)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61-376

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX and ARMANDO MERINO,
Relators,

vs.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,
Respondents.

PETITION FOR A WRIT OF QUO WARRANTO

Relators hereby petition this court for the issuance of a writ of quo warranto divesting Respondents of the authority to represent the plaintiffs in the case of G.A. et al. v. Public Health Trust of Dade County et al., case no. 80-2924-CIV-EBD, presently pending before the United States District Court for the Southern District of Florida. In support thereof, Relators state the following:

I

JURISDICTION

This court possesses original jurisdiction to issue writs of quo warranto to state officers and state agencies. *Florida Constitution*, Art. V, § 3(b)(8); *Florida Rule of Appellate Procedure* 9.030(a)(3). Respondent Brummer is the Pub-

lic Defender of the Eleventh Judicial Circuit of Florida. Respondents Weinstein and Ploss are Assistant Public Defenders of the Eleventh Judicial Circuit of Florida. Thus, Respondents are state officers. *Florida Constitution,* Art. V, § 18; *Florida Statutes* §§ 27.50, 27.53. Quo warranto is the appropriate manner by which to challenge the authority or power of state officials to exercise some right or privilege. See *Winter v. Mack,* 142 Fla. 1, 194 So. 225 (1940); *State ex rel. Merrill v. Gerow,* 79 Fla. 804, 85 So. 144 (1920); *State ex rel. Shevin v. Weinstein,* 353 So.2d 1251 (Fla. 3d DCA 1978). This is precisely the nature of the challenge being made in the present case.

II

FACTS

Respondents, as attorneys for the plaintiffs, instituted a civil proceeding in the United States District Court for the Southern District of Florida by the filing of a complaint seeking declaratory and injunctive relief in a case styled "G.A., a minor, on his own behalf and by R.A., his mother and next of friend on behalf of her son and all others similarly situated, Plaintiffs, vs. PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, AND ARMANDO MERINO, individually and in their official capacities, Defendants." (Appendix [hereinafter referred to as "A"] 1-16). The complaint challenges the constitutionality of certain policies, practices and procedures allegedly employed by the defendants in providing psychiatric treatment to adolescents. Filed in addition to this complaint was a motion for class certification, (A 17-21), a memorandum of points and authorities in support of that motion (A 22-32) and a motion for leave to proceed in forma pauperis. (A 33-34). The proceeding was given case no. 80-2294-CIV-EBD.

Prior to the filing of the complaint, plaintiff G.A. had been hospitalized in the adolescent unit of the psychiatric institute of Jackson Memorial Hospital. He had initially been admitted as a voluntary patient, at the request of his mother, plaintiff R.A. As time passed, R.A. became dissatisfied with the manner in which her son was being treated and sought to remove him from the hospital. Believing G.A. to be committable under Florida's Baker Act, *Florida Statutes* § 394, the hospital officials, rather than releasing G.A., sought to have him involuntarily committed.

The Public Defender was appointed to and did represent G.A. in the commitment proceeding. (A 35). The order appointing the Public Defender did so only "in all pending matters under Chapter 394-Part I, Florida Statutes." (A 35). The commitment proceedings resulted in the issuance of an order committing G.A. (A 36). Subsequently, however, a petition for a writ of habeas corpus was filed on G.A.'s behalf. (A 37-52). Acting on this petition, the circuit court ordered G.A.'s release. (A 53-55). G.A. was in fact released from custody and has remained at liberty since then.

The defendants in the federal case responded by opposing class certification, (A 56-76), suggesting that the case was moot due to G.A.'s release (A 77-93) and moving for the entry of an order denying leave to proceed in forma pauperis and disqualifying the Public Defender from representing the plaintiffs. (A 94-102). The motion to disqualify was denied, as the federal court concluded that it was a matter that should properly be presented to the state courts. (A 103-105). Although it had previously granted the plaintiffs' motion to proceed in forma pauperis, (A 106), the court, acting on the defendants' motion vacated the prior order and did deny plaintiffs the right to proceed

in forma pauperis. (A 103-105). To the best of Relator's knowledge, none of the other matters have been ruled on.

Subsequently, the plaintiffs filed an amended complaint (A 107-121) in which, in addition to the relief previously requested, plaintiffs sought damages. Respondents were joined by a private attorney, Eugene Zenobi, as counsel for plaintiffs on that pleading. Plaintiffs also filed a renewed request to proceed in forma pauperis, which has not yet been ruled upon. (A 122-125).

IV

ARGUMENT

The office of Public Defender "did not exist at common law and is a creature of Article V, § 18, Florida Constitution, with no authority outside of that provided by statute." *Graham v. Vann*, 394 So.2d 176, 177 (Fla. 1st DCA 1981). See also *Office of the Public Defender v. Baker*, 371 So.2d 684 (Fla. 4th DCA 1979) (granting writ of prohibition to prohibit circuit judge from appointing Public Defender in a dependency matter when statutes made no provisions for such representation); Attorney General Opinions 073-287, 073-111, 073-78, 072-197, 071-105, 071-67, 064-77 (consistently concluding that scope of Public Defender's authority is defined by statute). Indeed, the principle that the authority of a Public Defender is defined and limited by statute is a widely accepted one. See *Hayes v. State*, 599 P.2d 569 (Wyo. 1979); *Alaska Public Defender Agency v. Superior Court*, 584 P.2d 1106 (Alaska 1978); *Lee v. Superior Court in and for Maricopa County*, 472 P.2d 34, 106 Ariz. 165 (1970); *Norton v. State*, 400 A.2d 801, 167 N.J.Super. 212 (1979); *State v. Anonymous*, 279 A.2d 574, 6 Conn.Cir. 555 (1971).

That the scope of the Public Defender's powers is so limited is in accord with the general principles applicable

to the powers of any public official. These powers are prescribed by the Constitution or by statute, or both, and are measured by the terms and the necessary implication of the grant, *McGahey v. McLeod,* 135 So.2d 446 (Fla. 3d DCA 1961), and must be executed in the manner directed. *White v. Crandon,* 116 Fla. 162, 156 So. 303 (1934); *First National Bank of Key West v. Filer,* 107 Fla. 526, 145 So. 204 (1933). The authority to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any manner other than that which is authorized by law. *White v. Crandon, supra; First National Bank of Key West v. Filer, supra.*

In Florida, the situations in which Public Defender is authorized to represent an individual are set forth in *Florida Statutes* § 27.51(1):

> (1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s.27.52 and who is:
>
> (a) Under arrest for, or is charged with, a felony;
>
> (b) Under arrest for, or is charged with, a misdemeanor, a violation of chapter 316 which is punishable by imprisonment, or a violation of a municipal or county ordinance in the county court, unless the court, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if he is convicted;
>
> (c) Alleged to be a delinquent child pursuant to a petition filed before a circuit court; or
>
> (d) Sought by petition filed in such court to be involuntarily hospitalized as a mentally ill or mentally retarded person.

Viewed within the framework of their statutory authority, it is apparent that Respondents are acting in excess of that authority in representing G.A. and R.A. in the federal proceeding. Respondents are exceeding their authority in several respects.

(a) *The Public Defender has no authority to institute proceedings in federal court, other than one particular and narrowly defined set of circumstances not present here.* The four situations dealt with by *Florida Statutes* § 27.51(1) contemplate solely state proceedings. The only situation in which the Public Defender is statutorily authorized to appear in federal court is that defined by *Florida Statutes* § 27.51(4), which allows for the Public Defender of certain specific circuits, including the circuit for which Respondent Brummer is the Public Defender, to "handle all felony appeals to the state and federal courts required of" a Public Defender within the same district. This provision is clearly inapplicable here. The obvious reason is that it covers only cases involving felonies, which the present case does not. Additionally, however, it refers only to *appeals*, not the institution of original proceedings. It is thus apparent that the statute is intended to provide representation when an appeal is taken from a conviction in a state prosecution removed to federal courts under 28 U.S.C. 1443 and when a person represented by the Public Defender can appeal to the United States Supreme Court. 28 U.S.C. 1257.

When there exists no statutory provision allowing a state official to appear in federal court, that official cannot do so and quo warranto is a proper remedy to preclude him from doing so. See *State ex rel. Shevin v. Weinstein*, 353 So.2d 1251 (Fla. 3d DCA 1978) (holding that in light of absence of statutory authorization, State Attorney cannot represent State in federal court). This reasoning is directly applicable here.

(b) *The Public Defender has no authority to institute a civil proceeding in either state or federal court.* "The Office of the Public Defender was created as a result of United States Supreme Court cases requiring counsel for all indigent defendants charged with crimes punishable by incarceration." *Thompson v. Office of the Public Defender,* 387 So.2d 541, 543 (Fla. 5th DCA 1980) (footnote omitted). The money that the State of Florida utilizes to fund its Public Defender's offices is appropriated to meet its constitutional obligations in this regard. It is not appropriated for the purpose of allowing the Public Defender to engage in civil actions on behalf of private individuals can turn if they are indigent and are seeking an attorney to represent them in such a manner. Even if such programs did not exist, however, the facts would remain that the Public Defender, in the absence of statutory authorization cannot handle such cases.

The opinion of the First District Court of Appeal in *Graham v. Vann,* 394 So.2d 176 (Fla. 1st DCA 1981) does not alter the position taken here by Relators. In that case, the court held that the Public Defender could properly be appointed to represent convicted felons in a civil suit challenging the conditions of their confinement. That case is inapplicable here since it was based on *Florida Rule of Criminal Procedure* 3.111(b)(2) which provides that counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant. No such action was initiated here. Moreover, here, the Public Defender was not appointed to bring this action, but only to represent G.A. in the commitment proceedings. Further, *Graham v. Vann* dealt with a suit filed in the state court. There is no indication that the rule of criminal procedure relied upon there is intended to extend to cases in federal court. Finally, *Graham v. Vann* dealt with circumstances in which the

conditions of confinement were actually affecting the Public Defender's clients, not one in which they had already been discharged.

(c) *The Public Defender is not authorized to bring a class action, particularly when there is no showing that each member of the purported class is indigent and when there is no showing that the Public Defender was ever appointed to represent in any proceeding, any member of the class other than the named plaintiff.* "The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." *Branti v. Finkel*, ... U.S. ..... at ....., 100 S.Ct. 1287 at 1295 (1980) (footnote omitted). The Public Defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any such additional persons. He thus cannot undertake representation of a class.

This conclusion is particularly applicable when, as here, there has been no showing that the class members which the Public Defender seeks to represent are indigent. *Florida Statutes* § 2751(2) provides that the Public Defender may not be appointed even on a temporary basis for any person who is not indigent.

Additionally, the reasons set forth in section IV(g) of this petition regarding the Public Defender's inability to represent a person in a proceeding when no appointment has taken place regarding that proceeding are even more applicable to circumstances in which the individuals involved are the members of a class.

(d) *The Public Defender is not authorized to seek damages.* Even if it is said that the Public Defender can institute a civil proceeding, it cannot be said that his authority extends to the point of being allowed to seek damages. In *Graham v. Vann*, the civil suit was filed for

the purpose of requiring that the conditions of confinement, which were asserted as being violative of the prisoners' rights, be changed so that the rights were no longer being violated. Likewise, a post-conviction attack on a criminal conviction also involves the rectifying of a presently existing alleged violation of an individual's rights. Damages are of a different nature, however. They are sought not to change existing circumstances, but to compensate a person for a wrong which has already occurred. There is no reasonable theory under which the Public Defender's authority can be said to extend to requesting such relief. Such a role is in no way contemplated by any statutory or rule provision for the Public Defender. Moreover, a case in which damages is sought is one which can easily be undertaken by a private practitioner on a contingency fee basis and there exists therefore no rationale to allow the Public Defender to proceed in such a manner.

(e) *The Public Defender is not authorized to litigate a moot case.* It is apparent that, with the exception of the claim for damages, the federal case is now moot as regards the plaintiffs. There is no authority to allow the Public Defender to litigate a case under such circumstances. As noted previously in this petition, the Public Defender may not properly seek damages. Since no present issue exists as to the other relief the plaintiffs are seeking, there is no interest in allowing the Public Defender to expend resources on quixotic quests which in no way affect his clients. Moreover, *Florida Statutes* § 27.51(1) clearly contemplates only situations in which a case is pending and the result of that case will have a direct impact on the Public Defender's client.

(f) *The Public Defender is not authorized to represent a non-indigent client.* Florida Statutes § 27.51(2) provides that "[t]he court may not appoint the public defender to represent, even on a temporary basis, any per-

son who is not indigent." Here, the court before which the case is pending has specifically determined that the plaintiffs are not indigent. Respondents are therefore exceeding their authority in representing them.

(g) *The Public Defender is not authorized to represent any person in any proceeding without a specific appointment regarding that proceeding.* It is apparent that *Florida Statutes* § 27.51 contemplates representation by the Public Defender in any given proceeding *upon appointment by the court.* Here, the Public Defender was appointed to represent plaintiff G.A. for the competency hearing, but not for the federal proceeding. (Indeed a significant question exists at to whether a state court even can appoint counsel to represent a person in federal court. If it cannot, the argument previously set forth that the Public Defender cannot proceed into federal court would have to be deemed correct.) The appointment in the competency hearing can in no way be said to extend to the federal proceeding, since the federal case in no way challenges the conduct or result of the competency hearing. Since there has been no appointment here, Respondents are exceeding their authority. This conclusion is even more strongly compelled regarding plaintiff R.A., as the Public Defender has never been appointed to represent her in any proceeding.

V

ALTERNATIVE RELIEF

Should this court determine that quo warranto is not the appropriate remedy to be requested, but that Relators' claims may properly be reviewed by some other basis, such as prohibition or mandamus, Relators would respectfully request that this court, pursuant to *Florida Rule of Appellate Procedure* 9.040(c), treat this petition as a request for the appropriate relief, and that this court accordingly grant such relief.

VI

CONCLUSION

It is apparent that in representing the plaintiffs in the federal suit, Respondents are exceeding their authority in several respects. The resources of the State of Florida, through the Public Defender, are being improperly utilized. The Public Defender, as a public officer, owes a fiduciary duty to the people. *Matter of Grand Jury Subpoena Duces Tecum*, 397 A.2d 1132, 165 N.J.Super, 211 (1978). This duty is hardly being met by handling civil cases in the federal court, particularly in light of the fact that Respondent Brummer is presently under an order not to accept any more appeals in capital cases due to his protestations of insufficient resources. See *In re Directive to the Public Defender of the Eleventh Judicial Circuit of Florida*, ... So.2d ..... (Fla. 1981), case no. 60,513, opinion filed April 28, 1981 [6 F.L.W. 328]. A writ of quo warranto should thus issue, divesting Respondent of the authority to proceed in the federal proceeding discussed in this petition.

Respectfully submitted,

Jim Smith
Attorney General
/s/ Anthony C. Musto
Anthony C. Musto
Assistant Attorney General
Chief Counsel, Miami Division
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
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(305) 377-5441

Melinda S. Thornton
Assistant County Attorney
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Quo Warranto was furnished by mail to BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, BARRY WEINSTEIN & WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida, 1351 N.W. 12th Street, Miami, Florida 33125, on this 5th day of November, 1981.

/s/ Anthony C. Musto
Anthony C. Musto
Assistant Attorney General

(Filed December 14, 1981)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61-376

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX and ARMANDO MERINO,
Relators,

v.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,
Respondents.

RESPONSE TO ORDER TO SHOW CAUSE

Respondents Bennett Brummer, Public Defender of the Eleventh Judicial Circuit of Florida, and Assistant

Public Defenders Barry Weinstein and William Ploss (hereinafter referred to as "Public Defender") hereby respond to the Petition for a Writ of Quo Warranto ("Quo Warranto Petition") filed by the State of Florida through its Attorney General ("Attorney General"). Respondents assert that the Public Defender has full authority once appointed by a court to represent a client in a state involuntary commitment proceeding, to maintain a civil suit (in state or federal court) on direct and collateral issues which are substantially related to the purpose of the original appointment.

FACTS

The factual assertions herein are based on affidavits or other documents filed as part of the appendix hereto.

1. The Quo Warranto Petition filed by the Attorney General arises out of the Public Defender's representation, pursuant to Section 27.51(1)(d), Florida Statutes (1979), of G.A., a 17-year-old minor, in an involuntary hospitalization proceeding. At the request of his mother, R.A., G.A. was voluntarily admitted to the Adolescent Unit of Jackson Memorial Hospital ("Jackson" or "JMH") on September 17, 1980. G.A. and his mother, R.A., became dissatisfied with the treatment received by G.A., sought his discharge. The medical staff at JMH responded by instituting involuntary commitment proceedings against G.A. on September 29, 1980. (App. 2).

2. On October 2, 1980, the Public Defender was appointed to represent G.A. in this proceeding. G.A. and the Public Defender faced two basic issues in the involuntary commitment proceeding: (i) whether G.A. met the criteria of the Baker Act, Chapter 394.45, *et seq.*, Florida Statutes (1979) for involuntary commitment, and, if so, (ii) whether his condition required confinement in a mental hospital for treatment.

3. In the course of his representation of G.A. in the involuntary commitment proceeding, the Public Defender found that from and after his voluntary admission to JMH on September 17, 1980 (including the period after September 29, when the involuntary commitment proceeding was instituted), G.A. had been subjected to a treatment program which utilized "a form of adverse conditioning and punitive sanctions . . . [which lack] any discernable standards or reason . . . that would medically and psychiatrically justify their application to G.A." (App. 3) The program in question included the following practices:

(A) G.A. was stripped of his personal clothes, and was forced to wear only a hospital gown for prolonged periods of time;

(B) G.A. was absolutely prohibited from communicating with or visiting with his mother or friends, and was not permitted the use of a telephone;

(C) G.A. was not able to write letters to his mother or friends, and letters that he was permitted to receive were opened and read by staff personnel;

(D) G.A. was not allowed to go outdoors for exercise or to be exposed to the sunlight and fresh air;

(E) G.A. was made to sleep in the halls of the Adolescent Unit on only a mattress;

(F) G.A. was forced to sit in a chair and stare at the wall for long periods of time;

(G) On occasions, G.A. had access to bathroom facilities but at a specific time and no more than once an hour; and,

(H) G.A. was locked in solitary confinement for prolonged periods of time. Indeed, on one occasion he was locked in a seclusion area alone with a

> psychotic adult male who spoke only Spanish, and remained so confined for six days.

(App. at 2-3). In addition, G.A. was forced to ingest powerful mind-altering drugs without his consent or that of his guardian, as required by Section 394.459 of Florida Statutes (1979). (App. at 9). Dr. Stillman, after having observed these features of the confinement and treatment of G.A., informed the Public Defender that these conditions "were contributing to G.A.'s poor mental state, and would lead to his continued confinement under the Baker Act." (App. at 3).

4. In the opinion of the Public Defender, such conditions also violated G.A.'s rights under the First, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, Sections 2, 4, 9 and 17 of Article I of the Florida Constitution, and Chapter 394, Florida Statutes (1979) (App. at 33).

5. Therefore, on October 28, 1980, the Public Defender instituted litigation against the Public Health Trust of Dade County under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida (the "Civil Rights Action") on behalf of G.A. and all others similarly situated in the Adolescent Unit at JMH, seeking a declaratory, injunctive, or other equitable decree finding the conditions under which G.A. was confined violated his rights under the above constitutional provisions and statute. *G.A. v. Public Health Trust of Dade County*, S.D. Fla. Case No. 80-2924-Civ-EBD. The decision to file the Complaint as a class action was a tactical one. The Public Defender believed that a class action approach would increase the likelihood of obtaining relief for G.A. and other past and future clients of the Public Defender who are similarly situated. (App. at 4, 8-9). Since G.A. was a minor at the time the suit was filed, suit was instituted

through his next friend and mother, R.A., as required by F.R.Civ.P. 17(c). Contrary to the assertion of the *Quo Warranto Petition*, at 8, the Public Defender is not "representing R.A." in this Action or seeking any relief on her behalf. The Public Defender named R.A. in Civil Rights Action solely because Rule 17(c) of the Federal Rules of Civil Procedure *requires* that minors such as G.A. sue through an adult next friend.

6. Hearings were held in the involuntary commitment proceeding. In each hearing, the Public Defender represented G.A. G.A. was found to meet the Baker Act criteria for involuntary commitment. The Public Defender thereafter filed a *habeas corpus* petition, a civil proceeding in Circuit Court, challenging the validity of G.A.'s confinement. In two Orders dated December 10 and December 17, 1980, the Circuit Court held that although G.A. was in need of care and treatment, it was not proper to confine him for the purpose of that treatment. G.A. was temporarily released from JMH on December 10, 1980 pursuant to the state *habeas corpus* petition filed by the Public Defender.

7. On September 1, 1981, an amendment to the complaint in the Civil Rights Action seeking damages on behalf of G.A. was filed by Eugene Zenobi, a private attorney. Contrary to the assertion of the Quo Warranto Petition, at 8-9, the Public Defender is not seeking relief on behalf of G.A. in damages, since the damage portion of the Complaint is being handled exclusively by Eugene Zenobi, a private attorney who is in no way affiliated with the Public Defender. (App. at 4, 11). The Civil Rights Action is pending. The Public Health Trust has filed a suggestion of mootness and G.A. has responded in opposition. Contrary to the assertion of the *Quo Warranto Petition*, at 4, the Civil Rights Action is not a "moot case" since the federal court has not yet ruled on the Public Health Trust's

suggestion of mootness. Paradoxically, in the Civil Rights Action, the Attorney General has written a letter to the Court requesting a stay of the federal proceedings so that the *Quo Warranto Petition* would not be rendered moot. Obviously, the letter would have been unnecessary if the Civil Rights Action were moot. (App. at 18-19).

8. On November 20, 1981, G.A. became the subject of another involuntary hospitalization petition, in which the Dade County Circuit Court again declared him indigent and appointed the Public Defender to represent him. Pursuant to this petition, G.A. was confined at JMH from November 17 to November 29, 1981. (App. at 28-32). The petition was dismissed when G.A. escaped from JMH.

9. The Quo Warranto Petition asserts, at 10, that G.A. is a "non-indigent client." The Public Defender has been appointed to represent G.A. on five separate occasions by Circuit Judges sitting in the Probate and Juvenile divisions of the Eleventh Judicial Circuit, Dade County, Florida. (App. at 33). The Respondents believe G.A. to be indigent. The Attorney General has at no time attempted to set aside these Circuit Court determinations *which are binding on Respondents.* While the judge in the Civil Rights Action has vacated his order permitting G.A. to proceed *in forma pauperis*, it should be noted that the federal standard for determining indigency differs from the Florida standard. In any case, G.A. has also renewed his motion for permission to proceed *in forma pauperis* and has submitted additional evidence in support of his renewed application. The federal judge has not yet ruled on the renewed motion. Although it is irrelevant, the right of G.A. to proceed *in forma pauperis* in federal court is therefore pending before a federal tribunal. (App. at 33).

10. The *Quo Warranto Petition*, asserts, at 8, that the Public Defender, by bringing the Civil Rights Action as a

class suit, is seeking to represent individuals he is not authorized to represent. To the contrary, Respondent has been repeatedly appointed to represent clients who were confined in the Adolescent Unit at JMH. The bringing of a class action was the most efficient way to represent these individuals with the limited resources of the Public Defender and is fully consistent with past practice by the current Public Defender and his predecessor, Phillip A. Hubbart, who is now Chief Judge of the Third District Court of Appeal. (App. at 6, 8). Furthermore, as noted above, this is a tactical litigation decision. (App. at 8).

11. Respondents have in the past in carrying out their ethical responsibilities filed numerous civil proceedings in State Court on behalf of their clients, including *habeas corpus* and other types of civil proceedings. (App. at 5-6).

12. Respondents have in the past filed numerous civil proceedings *in federal courts* on behalf of clients, including *habeas corpus*, etc. These proceedings have been brought in furtherance of the ethical responsibilities of Respondents to diligently represent their clients' interests. (App. at 5-6).

13. The present Public Defender and his predecessor in office have, in the past, filed federal actions comparable to the Civil Rights Action brought under 42 U.S.C., Section 1983 including:

(1) *Ackies v. Purdy*, 322 F.Supp. 38 (S.D.Fla. 1970) (suit for declaratory and injunctive relief regarding conditioning of pretrial release on master bond list);

(2) *Moss v. Weaver*, 383 F.Supp. 180 (S.D.Fla. 1974) (suit for declaratory and injunctive relief regarding standard of probable cause for pretrial detention of juveniles);

(3) *Gerstein v. Pugh*, 420 U.S. 103 (1975) (suit for declaratory and injunctive relief leading to major Supreme Court decision on standard of probable cause for pretrial detention of adults);

(4) *Cardenas v. Morphonios*, (S.D.Fla. Case No. 77-4649-Civ.-NCR, 1977) (suit seeking removal of criminal action);

(5) *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (suit for declaratory and injunctive relief relating to requirement of money bail from indigents);

(6) *G.R. v. Taylor*, (S.D.Fla. Case No. 80-3021-Civ.-EBD, November 14, 1980) (suit seeking relief from illegal detention conditions in Dade County Juvenile Center).

(App. at 5-6).

ARGUMENT

APPLICABLE STATUTORY, CONSTITUTIONAL, AND ETHICAL STANDARDS AUTHORIZE AND REQUIRE THAT A PUBLIC DEFENDER, ONCE APPOINTED BY A COURT "SHALL REPRESENT" A CLIENT REGARDING BOTH DIRECT AND COLLATERAL ISSUES WHICH ARE SUBSTANTIALLY RELATED TO THE PURPOSE OF THE APPOINTMENT IN THE PARTICULAR CASE.

A. The Statutory Duty Of The Public Defender To Represent Indigent Persons In Involuntary Hospitalization Proceedings Necessarily Includes Authorization To Maintain Federal Civil Litigation On Collateral Issues Substantially Related To The Purpose Of Appointment.

Upon appointment, the Public Defender is statutorily required to represent indigents who are the subjects of involuntary hospitalization proceedings. Section 27.51(1)(d) of Florida Statutes provides as follows:

> The public defender shall represent. . . any person who is determined by the court to be indigent and who is . . . Sought by petition filed in such court to be involuntarily hospitalized as a mentally ill or mentally retarded person.

As noted *supra*, the Public Defender was appointed to represent G.A. in an involuntary hospitalization proceeding. In the course of that representation, the Public Defender was advised by Dr. Stillman that the dehumanizing conditions under which G.A. was confined (discussed *supra* at 2) had greatly increased his chances of being involuntarily hospitalized and had also violated several of his constitutional and statutory rights.[1] Accordingly, the Public Defender found it necessary to institute the Civil Rights Action seeking declaratory and injunctive relief against the operators of JMH, the facility to which he was confined. The Quo Warranto Petition presents the simple issue of whether the institution of the Civil Rights Action was within the statutory authority and discretion of the Public Defender.

The statute quoted above is silent regarding the precise method by which the Public Defender is to carry out his duties. It is axiomatic that the imposition of the duty of representation upon the Public Defender confers by implication:

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1. As the Baker Act provides:

> [I]ndividual dignity and human rights [shall] be guaranteed to all persons admitted to mental health facilities.

Sections 394.453 Florida Statutes (1979). *See also*, Sections 394.459(1)(2)(3)(4) and (5) Florida Statutes (1979).

> . . . every particular power necessary or proper for the complete exercise or performance of the duty that is not in violation of law or public policy.

State ex rel. Martin v. Michell, 188 So.2d 684, 687 (Fla. 4th DCA 1966). *See also, Deltona Corp. v. Florida Public Service Commission*, 220 So.2d 905, 907 (Fla. 1969) (statutory grant of power carries with it by implication everything necessary to carry out the power and make it complete).[2]

The Quo Warranto Petition cites no case upholding the Attorney General's contention that the Public Defender may not bring such collateral action. In fact, the law fully supports the Respondents' position. The only issue on which there is no controlling Florida law supporting Respondents' position is the Respondents' right to institute *federal* civil rights actions collateral to the Public Defender's appointment. On that issue, one federal court, applying controlling Florida precedent cited below, held the Public Defender had full authority to do so. Obviously, Respondent Brummer's predecessor, Public Defender (now Chief Judge of the Third District Court of Appeal) Hubbart, was of the same opinion since he filed many such actions.

This Court, as well as three District Courts of Appeal, has specifically approved institution and maintenance of civil litigation by the Public Defender. In *Villery v. Florida Parole and Probation Commission*, 396 So.2d 1107 (Fla. 1981), this Court upheld the institution by the Public Defender of a mandamus action against the parole com-

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2. A California court has interpreted that state's public defender statute to allow the filing of a *habeas corpus* petition arising from an involuntary commitment proceeding. The court stated: "[D]uties of the Public Defender include collateral and incidental activities that promote the accomplishment of his statutory duty." In re Johns, 66 Cal.App.3d 343, 135 Cal.Rptr. 893, 896 (1977). Like the Florida statute, the California public defender statute is silent on the issue of collateral civil litigation.

mission. The authority of the public defender to file a habeas corpus petition against the parole commission was upheld by the Fourth District Court of Appeal in *Florida Parole and Probation Commission v. Alby,* 400 So.2d 864 (Fla. 4th DCA 1981). The Third District Court of Appeal, on its own motion, appointed the Public Defender to represent a prisoner-appellant in a *pro se* administrative appeal from the determination by the parole commission of his presumptive parole date. *Roberson v. Florida Parole and Probation Commission* (Fla. 3d DCA Case No. 81-2171, December 4, 1981). Finally, the First District Court of Appeal in *Graham v. Vann,* 394 So.2d 176, 177, 178 (Fla. 1st DCA 1980) emphatically rejected the Attorney General's argument that:

> . . . the public defender statute does not encompass or contemplate civil representation by the Public Defender's Office when convicted felons challenge the constitutionality of their confinement.

Graham v. Vann, supra, is indistinguishable from the instant case. *Vann* held that a public defender possessed the authority to institute a civil proceeding on behalf of state prisoners seeking "relief from prison conditions that daily imperil their lives and safety." 396 So.2d at 177. Here, the Public Defender is instituting a civil proceeding on behalf of an involuntarily hospitalized person who seeks relief from conditions which not only violate several constitutional and statutory rights, but also increase the likelihood of his being so confined for the foreseeable future.

This situation frequently occurs when a public defender represents an indigent in an involuntary hospitalization proceeding. Not only is the Public Defender the attorney best equipped to litigate these issues (due to his familiarity with the particular facts involved), but he is

in all likelihood the only attorney who will be able to litigate them. The Director of the Governor's Commission on Advocacy for Persons with Developmental Disabilities states that a study now in final draft form "has confirmed that there is currently no effective system in Florida to meet the legal needs of the mentally disabled." (App. at 16). As John Powell, the Executive Director of Legal Services of Greater Miami, Inc., states in his affidavit:

> . . . outside of the Public Defender's Office there are few, if any, legal services programs to which indigent individuals can turn for representation regarding mental health claims and related matters. Even when Legal Services of Greater Miami, Inc. was at full staff, we did not have sufficient manpower or resources to provide representation in the mental health area. We . . . could not begin to address the need. Recent budget cuts have resulted in the layoff of approximately 50% of our personnel, and have reduced our meager capacity even further. . . . If the Office of the Public Defender does not provide representation it is very likely that no one will, and the legal rights of the mentally ill will not be redressed.

(App. at 12-13). Therefore, the Governor's Commission has concluded that:

> ". . . public defenders appointed to represent indigent persons in civil commitment proceedings need to represent persons in all proceedings arising from the initiation of civil commitment proceedings, including civil actions in the state or federal courts challenging the conditions of an institutional confinement, whenever such representation is deemed necessary by the public defender and his client. In our experience an attorney representing an individual at risk of commital or recommital to a custodial mental facility can-

> not isolate the issues in that proceeding from the overriding issues surrounding the quality and nature of the residential services in which the individual is or may be confined.

(App. at 16-17).

This Court's decision in *Shuman v. State*, 358 So.2d 1333 (Fla. 1978), requires that persons confined pursuant to involuntary commitment proceedings be afforded the same access to courts as persons confined pursuant to criminal charges. Rule 3.111(b)(2) of the Florida Rules of Criminal Procedure expressly provides for the appointment of counsel for indigent persons in "proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceeding as civil or criminal." The Attorney General's attempt to distinguish *Vann* on the basis of the language of Rule 3.111(b)(2) is without merit.

The policy behind the Public Defender's representation of criminal defendants pursuant to Rule 3.111(b)(2) applies with even stronger force to persons subject to involuntary commitment under the Baker Act. Persons confined pursuant to involuntary commitment proceedings are entitled to the vindication of their right of access to courts on the same basis as persons confined pursuant to criminal charges. *Shuman v. State, supra.* Public defender clients who are inmates confined in mental institutions have the same substantive rights as clients who are inmates confined in penal institutions despite the nonexistence of a procedural rule to implement the rights of the mental patients. Rule 3.111(b)(2) recognizes rather than creates a substantive right to effective counsel in both state and federal proceedings. The express purposes of the Baker Act reflect the only difference between the criminal defendant and the person subjected to dehuman-

izing conditions under that Act, is that one is alleged to have engaged in criminal activity and the other is a victim of mental illness. This illusory distinction has no force when applied to the vindication of substantive constitutional rights and the Baker Act patient is entitled to no less protection than the criminal defendant. *See, Addington v. Texas*, 441 U.S. 418 (1979); *In re Beverly*, 342 So. 2d 481 (Fla. 1977).

The United States District Court for the Southern District of Florida has relied upon *Vann* to hold that the Public Defender has authority under Florida law to institute a civil rights action in federal court. *G.R. v. Taylor, supra. Taylor* involved an attempt to remedy conditions at the Dade County Juvenile Detention Center. *See also, Graham v. State*, 372 So.2d 1363, 1365 (Fla. 1979). G.R. was instituted with funds from a federal grant received by the Public Defender, and approved by the State of Florida, which grant was entitled "Legal Representation of Mentally Ill Children and Adults" and was in effect from January, 1980 through January, 1981. This grant provided federal funds to pay for federal civil rights suits which could be instituted by the Public Defender to enhance the right to treatment of mentally ill minors and adults. It was awarded to the Public Defender by the Florida Bureau of Criminal Justice Assistance on the basis of a finding by the Office of the Governor that this project was "in accord with State plans, policies, procedures and programs." The grant had been approved by the Florida Council on Criminal Justice on July 16, 1979. The Attorney General is a member of this council pursuant to Section 23.152 of Florida Statutes (1979). (App. at 10).

Thus, while it is true, as the Attorney General states (Quo Warranto Petition, at 4) that "[the] scope of [the] Public Defender's authority is defined by statute", the

applicable statute places no limitations on the methods by which the Public Defender may carry out his duty of representing indigents in involuntary hospitalization proceedings. This is not a case like *Office of the Public Defender v. Baker*, 371 So.2d 684 (Fla. 4th DCA 1979), in which the Court was prevented from appointing the Public Defender to represent an individual within a certain class of persons.[3] Here, by contrast, the Public Defender has been properly ordered to represent G.A., has uncontested statutory authority to represent individuals such as G.A., and the Attorney General is attempting to place limits on the authority and discretion of the Public Defender in the latter's representation of these individuals, when no such limits exist in the statute. In the face of similar challenges, many Florida courts have concluded that once the Public Defender is appointed to represent someone he is required to represent, his discretion in choosing the means by which this representation is to be carried out should not be judicially limited.

In conclusion, Section 27.51(1)(d) Florida Statutes (1979) requires the Public Defender to represent indigents in involuntary hospitalization proceedings. Nothing in this statute limits the representational authority of the Public Defender. It is axiomatic that the establishment of the duty to represent necessarily carries with it the inherent power to initiate and engage in all litgiation necessary to the complete exercise of this mandate which is not conflict with another law or public policy. Accordingly, this Court, three Florida District Courts of Appeal, and the United States District Court for the Southern District of Florida have all indicated that the Public Defender may maintain neces-

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3. State ex rel. Shevin v. Weinstein, 353 So.2d 1251 (Fla. 3rd DCA 1978), which holds that the Attorney General, rather that the State Attorney, is the proper official to represent the state in federal court, is inapposite.

sary collateral litigation in any court in order to vindicate the rights of indigents he is required to represent in state proceedings. Such collateral litigation does not constitute improper "civil actions on behalf of private individuals" (Quo Warranto Petition, at 7).

Here the Civil Rights Action was necessary and appropriate. G.A. sought to change the conditions of his confinement, because such conditions were significantly contributing to the deterioration of his mental state. However, the issue here is not the wisdom or necessity of the Civil Rights Action; the issue is the authority of the Public Defender to make that judgment, as the subject of the disciplinary rules requiring him to exercise independent judgment, and to represent his clients competently and zealously. (Canons, 6 and 7, Code of Professional Responsibility).

B. Public Defender Clients, Like All Other Persons, Enjoy A Fundamental Right Of Access Under The Federal And State Constitutions To All Legal Remedies, Without Regard To Whether Those Remedies Are Designated As Civil.

The right of access to courts is one of the fundamental legal rights protected by the United States and Florida Constitutions, statutes, and rules of court. Without access to courts, other legal rights are meaningless:

> . . . [I]t is clear that unless an indigent inmate can reach the very threshold of the courts, all of the normal guarantees of due process do not come into play. Although he may have a claim which would entitle him to relief, absent the invocation of the judicial machinery the potential relief is merely a hollow promise.

Hooks v. Wainwright, 352 F.Supp. 163, 168 (M.D.Fla. 1972).

Both the United States and Florida Constitutions protect the right of access to courts. This right is expressly reflected in Section 21 of Article I of the Florida Constitution and has been judicially held to be protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. *See Bounds v. Smith,* 430 U.S. 817 (1977); *Johnson v. Avery,* 393 U.S. 483 (1969); *Griffin v. Illinois,* 351 U.S. 12 (1956). It is enjoyed by persons subjected to involuntary commitment proceedings. *Shuman v. State, supra.* More importantly, this Court has held that such persons must be afforded the same right of access to courts which is afforded persons charged with criminal offenses:

> The deprivation of liberty which results from confinement under a state's involuntary commitment law has been, termed a 'massive curtailment of liberty.' *Humphrey v. Cady,* 405 U.S. 504, 509 . . . (1972). Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitution, as are those incarcerated in our correctional institutions.

Shuman v. State, supra at 1335. It is therefore clear that under Florida law, persons subjected to involuntary hospitalization proceedings are entitled to the same right of access to courts enjoyed by persons confined by the state on criminal charges.

Florida Public Defenders have a long history of representing indigent criminal defendants in proceedings which can only be characterized as civil. Florida Public Defenders regularly represent indigent criminal defendants in proceedings such as habeas corpus [*R.B.S. v. Capri,* 384 So.2d 692 (Fla. 3d DCA (1980)], prohibition [*State ex rel. Smith v. Nesbitt,* 355 So.2d 202 (Fla. 3d DCA 1978)], common law certiorari [*Roberts v. State,* 345 So.2d 837

(Fla. 3d DCA 1977)], motions to vacate [*State v. Weeks*, 166 So.2d 892 (Fla. 1964)], and inspections under the Public Records Act (*Jackson v. Purdy*, Fla. 11th Cir., Case No. 77-14344, 1977). The Public Defender for the Eleventh Judicial Circuit has sought relief in civil actions in state and federal court at least since the days when the Office of Public Defender was held by the Honorable Phillip A. Hubbart, now Chief Judge of the Third District Court of Appeal. These civil actions have addressed the full panoply of constitutional and other deprivations from inspection of records under the Public Records Act (*Jackson v. Purdy*, *supra*) to an action for declaratory and injunctive relief which resulted in a leading U.S. Supreme Court decision on the standard of probable cause for the pretrial detention of adults. *Gerstein v. Pugh*, 420 U.S. 103 (1975). App. at 5-6. Other state and federal civil actions filed by the Public Defender include:

(1) *State v. Twyman* (Fla. 17th Cir., Broward County, Case No. 75-525 CRA, 1980) (suit seeking relief from conditions of confinement in mental hospital for Dade County inmates);

(2) *Lowery v. Metropolitan Dade County*, 43 Fla.Supp. 84 (Fla. 11th Cir., 1971) (suit for declaratory and injunctive relief regarding conditions of pretrial confinement in Dade County jail);

(3) *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (suit for declaratory and injunctive relief relating to the requirement of bail money from indigents);

(4) *Moss v. Weaver*, 383 F.Supp. 180 (S.D.Fla. 1974) (suit for declaratory and injunctive relief regarding standard of probable cause for pretrial detention of juveniles);

(5) *Ackies v. Purdy,* 322 F.Supp. 38 (S.D.Fla. 1970) (suit for declaratory and injunctive relief regarding conditioning of pretrial release on master bond list);

(6) *Cardenas v. Morphonios* (S.D.Fla. Case No. 77-4649-Civ-NCR, 1977) (suit seeking removal of criminal action);

(7) *G.R. v. Taylor, supra* (suit seeking relief from illegal detention conditions in Dade County Juvenile Detention Center).

(App. at 5-6). Despite this long tradition of civil actions, such filings have not diverted the attention of the Public Defender from his main caseload of criminal actions. Less than 1% of the cases handled by the present Public Defender have been civil actions. (App. at 5). The Civil Rights Action instituted on behalf of G.A. is no different from the federal and state civil litigation regularly engaged in by the Public Defender on behalf of indigents subjected to criminal proceedings. This Court's decision in *Shuman v. State, supra,* requires that the instant case be treated identically.

C. The Ethical Obligations Of The Public Defender Require That He Be Permitted To Bring Civil Suits On Both Direct And Collateral Issues Which Are Substantially Related To The Purpose Of His Appointment In An Involuntary Hospitalization Proceeding.

Once the Public Defender is appointed to represent a person, he enjoys the same attorney/client relationship, and incurs the same ethical obligations, as his counterpart in private practice. As the Supreme Court stated in *Ferri v. Ackerman,* 444 U.S. 193, 204 (1979):

> [t]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and furtherance of the federal interest in ensuring effective representation of criminal defendants, his duty is not to the public at large. . . [but] to serve the undivided interest of his clients. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independent of the government and to oppose it in adversary litigation.

See also, Carr v. State, 180 So.2d 381, 382 (Fla. 2d DCA 1965) (parity between court-appointed and privately retained counsel). A client who privately retains an attorney expects that such attorney will pursue every legal remedy available in furtherance of his objectives. *See* Disciplinary Rule 7-101 (attorney shall not intentionally fail to seek lawful objectives of client through reasonably available means); Ethical Consideration 7-9 (attorney must "always act consistent with the best interests of his client"). A person represented by the Public Defender in a state-instituted involuntary commitment proceeding should be able to expect no less. As this Court stated in a similar context:

> . . . state-appointed counsel . . . could continue their representation and seek federal relief [since] [t]heir professional responsibility may dictate this action . . .

Graham v. State, 372 So.2d at 1365 (Fla. 1979). G.A. needed to institute federal civil litigation on the collateral issue of his treatment conditions because such treatment materially affected his chances of winning or losing the involuntary commitment proceeding. The Attorney General, however, would limit G.A. to being represented at

the involuntary commitment proceeding and any appeals therefrom, and would require G.A. to forego any litigation of the constitutional and statutory rights of which the conditions of his confinement had deprived him. Fortunately, the Attorney General's proposed limitation on the Public Defender's authority has no support in Florida law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Quo Warranto filed by the State of Florida through its Attorney General should be denied.

Paul & Thomson
/s/ Parker D. Thomson
Parker D. Thomson
1300 Southeast First National
Bank Building
Miami, Florida 33131
(305) 371-2000
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Order to Show Cause was furnished by mail to ANTHONY MUSTO, Assitant Attorney General, Office of the Attorney General, Miami Division, 401 Northwest Second Avenue, Miami, Florida, on this 11th Day of December, 1981.

/s/ Parker D. Thomson

(Filed December 28, 1981)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61-376

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX and ARMANDO MERINO,
Relators,

v.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,
Respondents.

NOTICE OF FILING

COMES NOW Respondents, Bennett Brummer, Public Defender of the Eleventh Judicial Circuit of Florida, and Assistant Public Defenders Barry Weinstein and William Ploss, and file the attached Affidavit of William Reece Smith, Jr., in support of Respondents' Response to Order to Show Cause heretofore filed in this action.

Paul & Thomson
/s/ Parker D. Thomson
Parker D. Thomson
1300 Southeast Bank Building
Miami, Florida 33131
(305) 371-2000
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to ANTHONY MUSTO, Assistant Attorney General, Office of the Attorney General, Miami Division, 401 Northwest Second Avenue, Miami, Florida, on this 24th day of December, 1981.

/s/ Parker D. Thomson

AFFIDAVIT OF WILLIAM REECE SMITH, JR., ESQ.

BEFORE ME, the undersigned authority, personally appeared WILLIAM REECE SMITH, JR., who upon first being duly sworn, deposes and says that:

1. I am a member of The Florida Bar and have practiced law in Florida for 28 years. From 1972 to 1973 I was President of The Florida Bar. From 1980 until 1981, I was President of the American Bar Association. In these capacities I have become intimately familiar with many issues involving the ethical responsibilty of attorneys to fully and fairly represent their clients.

2. From 1976 to 1978 I was Chairman of the State Human Rights Advocacy Committee created under Section 20.19(6), Florida Statutes. From 1977 to 1979 I was Chairman of the Governor's Commission on Advocacy for Persons with Developmental Disabilities. In these capacities I have become intimately familiar with the problems of and the need for advocacy for the mentally disabled.

3. From 1973 to 1976 I was President of Florida Legal Services, Inc., and since that time I have remained involved in and knowledgeable about legal delivery systems to the indigent through legal services programs and public defenders.

4. There is only one ethical code of legal representation. This is so regardless of whether an attorney is privately retained or court-appointed, and regardless of the nature of the professional activities of the attorney. ABA Standards Relating to the Defense Function 1.1(e), 3.9 Approved Draft (1971); Preliminary Statement, Code of Professional Responsibility. The Supreme Court of Florida, in creating The Florida Bar, charged it with the responsibility of maintaining "the highest standards and obligations of the profession of law." Integration Rule, Florida Bar, Preamble (a). This standard is applied to all members of The Florida Bar, whether public or private.

5. The Code of Professional Responsibility requires that an attorney "exercise independent professional judgment on behalf of a client." Canon 5. A lawyer must represent a client competently and zealously within the bounds of the law. Canons 6, 7. Canon 7 is implemented by DR 7-101 which explicitly mandates that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means provided by law. An attorney must "always act in a manner consistent with the best interest of his client." EC 7-9. This does not mean that every issue that could be litigated on behalf of a client must be litigated. The attorney has a professional responsibility to exercise his judgment consistent with the best interests of his client.

6. A lawyer must always be free to exercise his professional judgment without regard to the interests or motives of any third person EC 5-23. Lawyers who are state officials owe a duty to their clients which is certainly no less than that which private lawyers owe to their clients. A lawyer should not accept employment from an organization designed to provide legal services unless there

is no interference in the relationship of the lawyer and the individual client he serves. All lawyers, public and private, have a constant responsibility to maintain professional independence in exercise of judgment. EC 5-24.

7. The degree of public confidence in our judicial system will depend on its ability to deliver legal services of sufficient breadth and competence. There is a well-recognized need for improvement of the delivery of legal services to the poor and in the area of mental health. Satisfaction of that need will require both increased representation and new and innovative approaches to representation.

FURTHER AFFIANT SAYETH NOT.

/s/ William Reece Smith, Jr.
William Reece Smith, Jr.

SWORN TO AND SUBSCRIBED
before me this 22 day
of December, 1981.

/s/ Rita C. Osborne
Notary Public, State of Florida
at Large

My Commission Expires: Oct. 24, 1982

(Filed December 14, 1981)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61-376

STATE OF FLORIDA, ex rel. JIM SMITH, Attorney General of the State of Florida; PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL; THOMAS J. KELLY; JOSEPHINA PEREZ; JAMES SUSSEX; and ARMANDO MERINO,
Relators,

v.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial of Florida; and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,
Respondents.

APPENDIX TO
RESPONSE TO ORDER TO SHOW CAUSE

TABLE OF CONTENTS

[App. 1]

October 15, 1980

To Dr. Kelly,

I was very anger to find out last Tuesday that my child was taking medicine and that this medicine makes him very dizzy and interferes with his studies and well being.

I had never given my consent to give him any medicine. I demand that no medicine be given to him unless

I am told what kind of medicine and on what dosage it is to be given, and I can supervise the effects of this medicine on my child.

I must add that on Tuesday I saw a marked deterioration on Gerald's physical health, as well as in his emotional and mental health.

During intake he was in power of all his judgment and could answer every question quick and without hesitation. Last Tuesday he was sluggish, nervous, seemed to have trouble holding his concentration, and had lost all assurance of himself.

I also demand that his clothes and shoes be given back to him immediately. You are breaking my child's emotional stability and morale by forcing him to wear an outfit that resembles to a long dress, and having him walk barefooted, and I do believe that is your design.

For all this reasons I demand the right to visit my child, and be participant and observant of his well being and progress.

So far you have been treating him without my consent, and against my will, and without informing me of the kind of therapy he is receiving.

All this must cease, till I give my consent.

Yours truly,
/s/ Ruth Alchin

[App. 2]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF DR. ARTHUR STILLMAN

BEFORE ME, the undersigned authority, personally appeared DR. ARTHUR STILLMAN, who upon first being duly sworn, desposes and says that:

1. My name is DR. ARTHUR STILLMAN. I am a medical doctor licensed in the State of Florida. I have specialized in the practice of psychiatry for thirty years.

2. At the request of the Public Defender's Office, I evaluated G. A. with regard to the petition for involuntary hospitalization filed against him on September 29, 1980.

3. As part of my evaluation of G. A., I took the opportunity to assess his mental state and the conditions under which he was confined in Jackson Memorial Hospital.

4. The "treatment" program operative in the Adolescent Unit of Jackson Memorial Hospital to which G. A. was subjected to included the following practices:

A. G. A. was stripped of his personal clothes, and was forced to wear only a hospital gown for prolonged periods of time;

B. G. A. was absolutely prohibited from communicating or visiting with his mother or friends, and was not permitted the use of a telephone;

C. G. A. was not able to write letters to his mother or friends, and letters that he was permitted to receive were open and read by staff personnel;

[App. 3] D. G. A. was not allowed to go outdoors for exercise or to be exposed to the sunlight and fresh air;

E. G. A. was made to sleep in the halls of the Unit on only a mattress;

F. G. A. was forced to sit in a chair and stare at the wall for long periods of time;

G. On occasions, G. A. only had access to bathroom facilities at a specific time no more than once an hour; and

H. G. A. was locked in solitary confinement for prolonged periods of time. Once, when I saw G. A. for evaluation, he was locked in a seclusion area alone with a psychotic adult male who only spoke Spanish. He remained so confined for six days.

5. This "treatment" program utilizes a form of adverse conditioning and punitive sanctions. I was not able to ascertain any discernable standards or reason for these practices that would medically and psychiatrically justify their application to G. A.

6. My evaluation led me to the conclusion that the conditions under which G. A. was confined were contributing to G. A.'s poor mental state, and would lead to his continued confinement under the Baker Act. I so informed the Office of the Public Defender.

FURTHER AFFIANT SAYETH NOT.

/s/ Dr. Arthur Stillman MD.
Dr. Arthur Stillman

SWORN TO and subscribed before me
this 10th day of December, 1981.

/s/ Linda S. Baracas
Notary Public, State of Florida
at Large

My Commission Expires: April 7 1985

[App. 4]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA, ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF PUBLIC DEFENDER BENNETT H. BRUMMER

BEFORE ME, the undersigned authority, personally appeared BENNETT H. BRUMMER, who upon first being duly sworn, deposes and says that:

1. My name is Bennett H. Brummer. I am the duly elected Public Defender for the Eleventh Judicial Circuit of Florida. I was officially commissioned as Public Defender in January, 1977. I have been employed in the Office of the Public Defender since 1971.

I am an attorney, having been admitted to practice by this Court in November, 1965. I have also been admitted to practice before the New York and federal courts.

2. The Office of the Public Defender does not now represent and has never represented G. A. with regard

to the damage claim included in the amended complaint filed in *G. A. v. Public Health Trust.* Eugene Zenobi, Esquire, now represents and has always represented G. A. with regard to that damage claim.

The relators have never discussed the issue of which attorney was representing G. A. with regard to the damage claim with any of the respondents or Eugene Zenobi, Esquire, prior to subsequent to filing their petition.

3. I have determined that the filing of civil cases in state and federal court is consistent with the statutory, constitutional, and ethical obligations of the Office of the Public Defender to its clients.

[App. 5] 4. I did not initiate the practice of filing civil actions in state and federal court on behalf of the clients of this office. My predecessor, the Honorable Phillip A. Hubbart, who is now Chief Judge of the Third District Court of Appeal, engaged in that practice while I was an Assistant Public Defender.

5. My office has handled over 20,000 cases per year for the last few years. I have exercised my independent, professional judgment as to the need to file civil proceedings in state and federal court on behalf of our clients. I estimate that my judgment has resulted in the filing of civil proceedings in state court in less than 1% of our cases, and in federal court in less that 1/10th of 1% of our cases.

6. To the best of my recollection, the following are the civil actions filed by my predecessor and me in state and federal court:

A. *Lowery v. Metropolitan Dade County,* 43 Fla. Supp. 84 (Fla. 11th Cir. 1971), requesting declaratory and injunctive relief regarding conditions of pretrial confinement in the Dade County Jail;

B. *Pugh v. Rainwater,* 572 F.2d 1053 (5th Cir. 1978) (en banc), seeking declaratory and injunctive relief relating to the requirement of money bail from indigents;

C. *Gerstein v. Pugh,* 420 U.S. 103 (1975), seeking declaratory and injunctive relief regarding the standard of probable cause for the pretrial detention of adults;

D. *Moss v. Weaver,* 383 F. Supp. 180 (S.D.Fla. 1974), seeking declaratory and injunctive relief regarding the standard of probable cause for the pretrial detention of juveniles;

E. *Ackies v. Purdy,* 322 F. Supp. 38 (S.D.Fla. 1970), seeking declaratory and injunctive relief relating to conditioning pretrial release on a master bond list;

F. *Jackson v. Purdy,* (Fla. 11th Cir., Case # 77-14344, 1977) seeking information under the public records act to be used as evidence;

G. *Cardenas v. Morphonios,* (S.D.Fla., Case # 77-4649-Civ-NCR, 1977), seeking removal of a criminal action;

[App. 6] H. *State v. Twyman,* (Fla. 17th Cir., Case # 75-525 CFA, 1980), seeking relief from conditions of confinement in a mental hospital for Dade County inmates, with the Broward Public Defender;

I. *G. R. v. Taylor,* (S.D.Fla., Case # 80-3021-Civ-EBD, 1980), seeking relief from illegal conditions of detention in the Dade County Juvenile Detention Center.

J. Additionally, over the last ten years, the Office of the Public Defender has found it necessary to file numerous petitions for extraordinary relief on behalf of its clients. For example, during the two years from November, 1979, to November, 1981, the office filed 7

habeas corpus petitions in federal court, and 51 habeas petitions in state court.

Included among the cases filed as class actions by this office are: *Lowery, Pugh, Gerstein, Moss, Ackies,* and *Taylor.* One purpose for filing cases as class actions is to avoid mootness problems arising from the transitory nature of the confinement of particular clients. See *Gerstein v. Pugh, supra* at n. 11.

7. It is the policy of my office that we attempt not to accept the responsibility for an additional client, before we are able to adequately represent each of those clients whom we have already been appointed to represent. Our ability to adequately represent our clients is severely limited by the resources allocated to this office.

It is consistent with this policy to allocate to each client the resources necessary to adequately represent him. It is also consistent with this policy to attempt to limit our appointment to new capital appeals, because those cases are especially time-consuming and would have an extremely debilitating effect on our ability to represent current clients.

This office represents approximately twelve individuals on capital appeals in this Court. We have successfully attempted to comply with a very stringent briefing schedule established by the Court in nine cases. We are now in the process of presenting oral argument before the Court in those cases.

[App. 7] My office continues to accept capital "cases", and was appointed in 76 capital felony cases in FY 1980-81.

FURTHER AFFIANT SAYETH NOT.

/s/ Bennett H. Brummer
Bennett H. Brummer

SWORN TO and subscribed before me
this 10th day of December, 1981.

/s/ Linda S. Baracas
Notary Public, State of Florida
at Large

My Commission Expires April 7 1985

[App. 8]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF WILLIAM PLOSS

BEFORE ME, the undersigned authority, personally appeared WILLIAM PLOSS, who upon first being duly sworn, deposes and says that:

1. My name is William Ploss. I am an Assistant Public Defender.

2. In my capacity as Assistant Public Defender, I was the attorney of record for Plaintiff, G. A. in the civil commitment action (case # 80-7931). The mistreatment to which my client was subjected and its impact upon the involuntary commitment proceeding served as the impetus for the filing of the federal civil rights action against the relators.

3. During my representation of G. A. for the civil commitment action, he informed me that on several occasions he had been refused access to a telephone when he had expressly stated that he wanted to call me regarding his case.

4. I verified with the staff of the Adolescent Unit the fact that G. A. had indeed been refused access to a telephone to call me regarding his case. The staff explanation for such refusals was that G. A., because of inappropriate behavior, had been placed on restriction and therefore was not allowed to initiate or receive telephone calls while so restricted.

5. In my capacity as Assistant Public Defender, I have also represented other clients in civil commitment proceedings who were held in the Adolescent Unit and who were under the care of relators Kelly and Perez. I was refused access to two of these [App. 9] clients (D. W. and P. P.) by relator Kelly. Client D. W. was also refused telephone access to me and the staff of the Adolescent Unit explained this restriction on telephone communications as a "punishment" given to D. W. "because he wouldn't become a voluntary patient".

6. G. A. was forced to ingest powerful mind-altering drugs without his consent or the consent of his guardian as is required by Florida Statute § 394.459.

7. The federal suit was filed as a class action because in my judgment the class action approach increased the likelihood of obtaining relief for G. A. and other past and future clients of the Office of the Public Defender who were similarly situated.

FURTHER AFFIANT SAYETH NOT.

/s/ William Ploss
William Ploss

SWORN TO and subscribed before me
this 11th day of December, 1981.

/s/ Linda S. Baracas
Notary Public, State of Florida
at Large

My Commission Expires April 7 1985

[App. 10]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF MARK WEINSTEIN

BEFORE ME, the undersigned authority, personally appeared MARK WEINSTEIN, who upon first being duly sworn, deposes and says that:

1. My name is Mark Weinstein. I am the Business Manager of the Office of the Public Defender for the Eleventh Judicial Circuit.

2. On January 9, 1980, the Public Defender was awarded a Law Enforcement Assistance Administration grant entitled, "Legal Representation of Mentally Ill Children and Adults". The grant was in effect from January, 1980, to January, 1981, and provided federal funds to pay for federal civil rights suits which could be instituted by the Public Defender to enhance the right to treatment of mentally ill minors and adults.

3. The grant was awarded by the Florida Bureau of Criminal Justice Assistance. The Office of the Governor had found the project to be "in accord with State plans, policies, procedures and programs". The grant had been approved by the Florida Council on Criminal Justice on July 16, 1979. The Attorney General is a member of that council pursuant to Florida Statutes § 23.152.

FURTHER AFFIANT SAYETH NOT.

/s/ Mark Weinstein
Mark Weinstein

SWORN TO and subscribed before me
this 9th day of December, 1981.

/s/ Linda S. Baracas
Notary Public, State of Florida
at Large

My Commission Expires: April 7 1985

[App. 11]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF EUGENE ZENOBI, ESQ.

BEFORE ME, the undersigned authority, personally appeared EUGENE ZENOBI, who upon first being duly sworn, deposes and says that:

1. My name is Eugene Zenobi. I am an attorney admitted to practice before this Court, the courts of Pennsylvania, and the federal courts.

2. I am engaged in the private practice of law, and have extensive experience in civil rights cases.

3. In the case of *G. A. v. Public Health Trust*, I represent G. A. with regard to the damage claim contained in the amended complaint. The Office of the Public Defender does not now represent and has never represented G. A. with regard to the damage claim.

4. I am representing G. A. at no charge to G. A. or his family. If successful, I intend to seek attorney's fees pursuant to federal statute.

FURTHER AFFIANT SAYETH NOT.

/s/ Eugene Zenobi
Eugene Zenobi

SWORN TO and subscribed before me
this 8th day of December, 1981.

/s/ Linda S. Baracas
Notary Public, State of Florida
at Large

My Commission Expires: April 7 1985

[App. 12]

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, etc., et al.,
Relators,

v.

BENNETT BRUMMER, etc., et al.,
Respondents.

AFFIDAVIT OF JOHN POWELL, ESQ.

BEFORE ME, the undersigned authority, personally appeared JOHN POWELL, who upon first being duly sworn, desposes and says that:

1. My name is John Powell. I am an attorney, and serve as the Executive Director of Legal Service of Greater Miami, Inc.

2. To the best of my knowledge, outside of the Public Defender's Office there are few, if any, legal services programs to which indigent individuals can turn for representation regarding mental health claims and related matters.

3. Even when Legal Services of Greater Miami, Inc. was at full staff, we did not have sufficient manpower or resources to provide representation in the mental health area. We handled an extremely small number of such cases, and could not begin to address the need. Recent budget cuts have resulted in the layoff of approximately 50% of our personnel, and have reduced our meager capacity even further.

4. To the best of my knowledge, Legal Services programs have regarded the mental health area primarily

as the responsibility of the Public Defender, in accordance with state law.

5. Legal Services has very little professional experience or expertise in the mental health area. Virtually no attorney or group of attorneys, outside of the Public Defender's Office, has much mental health experience or expertise.

[App. 13] 6. There is a great need for the delivery of legal services in the mental health area. If the Office of the Public Defender does not provide representation it is very likely that no one will, and the legal rights of the mentally ill will not be redressed.

FURTHER AFFIANT SAYETH NOT.

/s/ John Powell
John Powell

SWORN TO and subscribed before me
this 7th day of December, 1981.

/s/ (Illegible)
Notary Public, State of Florida
at Large

My Commission Expires: May 25 1984

[App. 14]

City of Tallahassee)
) ss
State of Florida)

AFFIDAVIT OF JONATHAN P. ROSSMAN

Jonathan P. Rossman, Director, Governor's Commission on Advocacy for Persons with Developmental Disabilities, being duly sworn, deposes and says:

1. I am an attorney, member of The Florida Bar, Vice-Chairman of the Florida Bar Committee on the Rights of the Mentally Disabled, member of the Editorial Advisory Board of the Mental Disability Law Reporter of the American Bar Association and possess knowledge and experience in the legal needs of mentally disabled citizens residing in the State of Florida.

2. This statement has been authorized as an official statement made on behalf of the Governor's Commission on Advocacy for Persons with Developmental Disabilities. The position of the Commission does not necessarily reflect that of the Governor or any other agency of state government. Its viewpoint is representative of the interests of the developmentally disabled. Commission members, who are appointed by the Governor, include handicapped individuals, parents of handicapped individuals, physicians, educators, local government officials, attorneys, and other professionals.

3. The Governor's Commission on Advocacy for Persons with Developmental Disabilities has responsibility for implementing on behalf of the State of Florida the protection and advocacy system established pursuant to 42 U.S.C.A., Section 6012, the Developmentally Disabled Assistance and Bill of Rights Act. The Commission has the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of developmentally disabled persons who are receiving treatment, services, or rehabilitation within the State and is required to be independent of any provider of services or habilitation to individuals with developmental disabilities. Among its primary responsibilities is to assess the [App. 15] protection and advocacy needs of developmentally disabled persons within the State and to set priorities among those needs. F.A.C. Rule 22N-1.04.

4. Developmental disabilities are defined for the purposes of the Commission's activities as including any severe physical or mental impairment first occurring in the early years of life which result in a substantial limitation on the development of major life functions. These include among other conditions; mental retardation, epilepsy, autism, and cerebral palsy. Not all mentally disabled individuals are developmentally disabled because some mental illness does not arise until later life. But, severe emotional disturbance or mental illness manifested prior to age twenty-two is considered a developmental disability. 42 U.S.C.A. 6001(7). F.A.C. Rule 22N-1.02. G.A. the plaintiff in *G.A. et al. v. Public Health Trust of Dade County, et al.* would, in my opinion, be considered developmentally disabled as would numerous other individuals subject to involuntary commitment to a mental hospital under Chapter 394, Florida Statutes. The Commission has, in fact, during the course of its regular activities, dealt with many such individuals.

5. The Commission has considerable interest in the issue raised by the Attorney General's Petition for a Writ of Quo Warranto filed with the Florida Supreme Court challenging the authority of the Public Defender of the Eleventh Judicial Circuit to bring the proceeding referenced above on behalf of G.A. In addition to individuals such as G.A., many other developmentally disabled individuals are entitled to legal representation by public defenders in Chapter 393.11 proceedings (involuntary admission to mental retardation facilities). Their right to full and effective legal counsel is equally threatened by the Attorney General's petition.

6. There is a serious lack of legal services available to mentally disabled persons in the State of Florida. The Commission has identified as its principle objective the

expansion of legal services to this population. The Commission's findings in this regard are confirmed by the report - *The Legal Needs of the Poor and* [App. 16] *Underrepresented Citizens of Florida; An Overview* submitted to the Florida Supreme Court in *The Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979) at 120-124 (1980). The Board of Governors of the Florida Bar in recognition of this critical problem has authorized an additional study to be conducted addressing specifically the delivery of legal services to the developmentally and mentally disabled population. This study funded in part by the Governor's Commission now in its final draft stages has confirmed that there is currently no effective system in Florida to meet the legal needs of the mentally disabled. *Draft, Study of the Legal Needs of the Mentally and Developmentally Disabled*, Nelson, Alice K., M.S.W., J.D., (1981).

7. Among the findings of the Legal Needs Study referred to in paragraph 6 above, the following are supported by the experience of the Governor's Commission:

a). Significant Bar involvement in the representation of mentally disabled persons is not possible at the present time.

b). Pro bono efforts have had a limited impact on meeting the legal needs of the mentally disabled.

c). The Legal Services Corporation definitely has a role in the delivery of legal services to the mentally disabled, but it alone cannot meet the present need. This fact is made more acute by the Federal cutbacks in funding of the Legal Services Corporation. (The Governor's Commission has already received numerous refusals to accept referrals on routine matters involving mentally disabled clients from legal service programs citing their inability to expand current case loads due to lack of resources.)

8. The Governor's Commission on Advocacy believes that public defenders appointed to represent indigent persons in civil commitment proceedings need to represent such persons in all proceedings arising from the initiation of the civil commitment proceedings, including civil actions in the state or federal courts challenging the conditions of an institutional confinement, whenever such representation is deemed necesssary by the public defender and his client.

[App. 17] 9. In our experience an attorney representing an individual at risk of committal or recommittal to a custodial mental facility cannot isolate the issues in that proceeding from the overriding issues surrounding the quality and nature of the residential services in which the individual is or may be confined.

An attorney representing an individual in a civil commitment proceeding must look beyond that proceeding to ascertain whether or not there are any factors external to his client which may increase the likelihood of his client's institutionalization or that will exacerbate his client's need for continued hospitalization. Inadequate staffing, excessive psyscotropic medication, overcrowding and abusive treatment are all conditions in which effective treatment and habilitation cannot take place and are in fact debilitating, distorted service delivery patterns which thwart the development of community alternatives can force clients unnecessarily into large institutions. If such factors exist an attorney cannot effectively represent his client in a civil commitment proceeding without also seeking ways to remove or alleviate such external conditions.

10. The Public Defender assigned to represent a mentally disabled individual in a civil commitment proceeding is obliged to insure that the individual's constitu-

tional rights are fully protected, otherwise it is inevitable that these rights will be lost through inaction or incapacity.

/s/ Jonathan P. Rossman
Jonathan P. Rossman

Subscribed and sworn to before me
this 11 day of December 1981.

/s/ Charlotte R. (Illegible)
Notary Public

My Commission expires: (Illegible)

[App. 18]

DEPARTMENT OF LEGAL AFFAIRS

Office of the Attorney General
The Capitol
Tallahassee, Florida 32304

JIM SMITH
Attorney General
State of Florida

401 N.W. 2nd Ave., Suite 820
Miami, Florida
(305) 377-5441

November 6, 1981

Judge Edward B. Davis
P. O. Box 013189
Miami, Florida 33101

Dear Judge Davis:

At a recent hearing in the case of G.A. et al. v. Public Health Trust of Dade County, et al., case no. 80-2924-CIV-EBD, I addressed the court as an amicus curiae to inform you of the intention of the Attorney General's office to institute proceedings in the state courts to challenge the authority of the Public Defender to represent the plain-

tiffs in the case pending before you. This letter is to advise you that a petition for a writ of quo warranto, making such a challenge, has been filed in the Florida Supreme Court. A copy of that petition is enclosed for your information.

When I appeared before you, I also suggested that you might wish to consider staying proceedings pending disposition of the state proceedings and you indicated a reluctance to do so in the absence of a pending case. That situation has of course now changed, so I wish to once again offer the same suggestion. Clearly, the question of whether the Public Defender has the authority to represent individuals in a civil suit in federal court is a substantial issue which should be determined by the courts of the State of Florida. If you should proceed with the case before you, it is possible that the case will be decided before the Florida Supreme Court rules and that fact could have the effect of rendering the state proceedings moot. Thus, in the interest of enabling this significant state issue to be litigated, a stay would seem appropriate.

In considering whether or not to stay proceedings, I think it is also significant to realize that while the suit before you challenges certain procedures utilized in providing psychiatric treatment, the plaintiffs are not currently being affected by the procedures, as plaintiff G.A. is no longer receiving treatment and plaintiff R.A. has never received treatment. Thus, the granting of a stay would have no serious effect upon them and their claims can be given full consideration after the state proceeding is concluded.

[App. 19] I would also like to assure you that I am of course aware of your need to expeditiously decide all cases before you. In order to minimize whatever delay might result from a stay, I am more than willing to seek to expedite the case in the Florida Supreme Court. If you

should decide to stay proceedings, I will, therefore, upon notification of your decision, file a motion directed to that end.

If I can answer any questions you might have or be of assistance in any other manner, please be assured that I am at your disposal. Thank you in advance for your consideration of my suggestion.

Sincerely,

/s/ Anthony C. Musto
Anthony C. Musto
Assistant Attorney General
Chief Counsel, Miami Division

ACM/lg

cc: Melinda Thornton
Bennett Brummer√
Barry Weinstein
William Ploss
Eugene Zenobi

[App. 20]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-3021-CIV-EBD

G.R.,
Plaintiff,

vs.

ALVIN TAYLOR,
Defendant.

ORDER

Upon consideration of the memoranda of the parties, the Court hereby rules on the following motions in this action challenging conditions at the Dade County Juvenile Detention Center.

I. DISQUALIFICATION

The defendants associated with the Florida Department of Health & Rehabilitative Services (hereafter "the HRS defendants") moved for the disqualification of the Dade County Public Defender's office as counsel for the plaintiff. The HRS defendants claim that the Public Defender is without authority to represent an indigent party in a civil rights action such as this one.

Motions to disqualify counsel commonly are based on ethical violations or conflicts of interest. *E.g., Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742 (5th Cir. 1980). No such violations or conflicts are alleged by the HRS defendants, bringing into doubt the appropriateness of the motion.

The Court need not reach that issue, however, because [App. 21] an authoritative Florida court has recently decided a similar question about a public defender's authority to pursue civil rights actions such as this one. In *Graham v. Vann,* 394 So. 2d 176 (Fla. 1st DCA 1981), it was held that a public defender could represent adult prisoners in a habeas corpus action challenging prison conditions. The District Court of Appeal, First District, found authority for the public defender to act in the mandate of Fla.R. Crim.P. 3.111(b)(2). 394 So. 2d at 178; *see* Fla. Const. Art. V, § 18; Fla. Stat. § 27.51(1) (1979). Rule 3.111(b)(2) authorizes public defenders to provide counsel to indigents in adversary proceedings "regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal."

The compass of Rule 3.111 specifically includes juvenile proceedings. *Id.*, (b)(1). Therefore, the holding of *Graham v. Vann* applies to this action, and this Court follows that authority in denying the motion to disqualify.

II. ANONYMITY

The plaintiff, a minor incarcerated at the Dade Juvenile Detention Center when this suit was filed, has moved to proceed anonymously in this action to avoid embarassment and possible humiliation. The defendants associated with the School District of Dade County (hereafter "the School Board defendants") have opposed the motion, and seek to require G.R. and his mother, E.W., to pursue this suit under their full names.

There is no question but that all defendants have actual knowledge of the complete identities of the defendant and his mother. There is no question but that federal courts have frequently permitted plaintiffs to proceed anonymously to avoid embarassment when sensitive issues

are raised. While actions such as *Roe v. Wade,* 410 U.S. 113 [App. 22] (1973), appear to have been brought by plaintiffs of legal age, the policy considerations behind allowing pseudonymous pleadings can only be stronger where a minor is involved.

The motion to proceed anonymously is GRANTED. *See* Fed. R.Civ.P. 11.

III. DISCOVERY

The HRS defendants have moved for a protective order after their blanket refusal to comply with the plaintiff's first request for production. The plaintiff then moved to compel production.[1]

The Federal Rules contemplate liberal discovery. Therefore, the plaintiff's motion to compel is granted and the defendant's motion for a protective order is denied, except that the HRS defendants may permit inspection of the requested documents at the defendant's place of business or other reasonable location. The defendants shall produce the documents as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. Fed.R.Civ.P. 34(b) (as amended April 29, 1980).

IV. CERTIFICATION

The plaintiff moved to certify this cause as a class action. The defendants oppose the motion, and have jointly moved for a certification hearing.

On the present record, the Court is able only to determine that the proposed class meets most of the pre-

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1. Neither motion conformed to the Local Rules of this Court. *See* Local Rule 10(I). The parties are cautioned that any future discovery motions which fail to conform with the Local Rules will be denied.

requisites [App. 23] for a class action, as discussed below. Additional briefing is required on the issue of adequate representation. Thus, a ruling on the motion to certify must be deferred and a decision on whether to hold a hearing must also await supplementation of the record. The Court today rules on most of the class issues to simplify these proceedings and focus attention on the remaining issues.

The plaintiff has moved for certification of two subclasses of persons at the Dade Juvenile Detention Center, 1) those incarcerated while awaiting trial and 2) those imprisoned following adjudications of delinquency. Subclasses are necessary only when interests in one subdivision conflict with the other, or when claims are so greatly varied that management of the litigation will be aided by certifying subclasses. *See* Manual for Complex Litigation, *Procedures* § 1.42. There is no conflict between the interests of the proposed subclasses. The claims of each putative class are nearly identical. Therefore, the motion for certification will henceforth be considered only as it applies to one general class encompassing both of the plaintiff's proposed subclasses.

A. Numerosity

The plaintiffs have brought their action on behalf of the approximately 160 inmates of the Dade Juvenile Detention Center and all future persons to be incarcerated at the center. None of the defendants have challenged that the inmate population usually consists of about 160 persons.

Membership of a class must be "so numerous that joinder of all members is impracticable . . ." Fed.R.Civ.P. 23(a)(1). This numerosity requirement is interpreted liberally when a class action is sought under section (b)(2)

of Rule 23. *Jones v. Diamond,* 519 F.2d 1090, 1099 (5th Cir. 1975).

The focus is not on numbers alone, but on the practicality [App. 24] of joinder. When persons to be affected in the future are prospective plaintiffs, their joinder becomes inherently impracticable. *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, 1022 (5th Cir. 1981). Given the unchallenged size of the present population of the Dade Juvenile Center, the inclusion of persons to be incarcerated in the future, and the policies favoring finding a class action of this type, the Court determines that the numerosity requirement has been met.

B. Common Questions

The School Board defendants have challenged whether the plaintiff's complaint raises the common questions required by the Federal Rules. A class will not be certified unless there are "questions of law *or* fact common to the class . . ." Fed.R.Civ.P. 23(a)(2) (emphasis added). While the School Board defendants argue that different inmates may be exposed to different factual situations, they all but ignore the disjunctive "or" of the Rule.

While there may indeed be varying questions of fact depending on the circumstances of different members of the alleged class, this action arises under policies promulgated by the defendants, which policies apply to all inmates. The complaint alleges common conditions at the Juvenile Center. Thus, common questions of fact predominate over individual questions, making class certification desirable. *See* 3B Moore's Federal Practice ¶ 23.45[2].

Common questions of law—whether or not the defendants' policies violate the plaintiff class's constitutional rights—certainly predominate. *Id.* The Court finds that

the plaintiff has met both alternatives to the common question prerequisite of Rule 23(a)(2).

[App. 25] *C. Typicality*

Neither group of defendants has challenged that the claims or defenses of the representative parties are typical of the class. Fed.R.Civ.P. 23(a)(3). The plaintiff points out that the claims of all members of a class need not be identical as long as they are based on the same theories, and this Court agrees. A plaintiff who alleges violation of his constitutional rights may bring an "across the board" class action to represent all persons who have suffered from the same policies, whether or not all class members have had their rights infringed in exactly the same way. *See Phillips v. Joint Legislative Commission*, 637 F.2d 1014, 1024 (5th Cir. 1981) (alleging racial discrimination).

D. Advance Representation

The HRS defendants have challenged class certification on the grounds that the plaintiff's counsel will be unable to fairly and adequately protect the interests of the class. The School Board defendants maintain that G.R. is an inadequate representative of the class.

Fed.R.Civ.P. 23(a)(4) requires that the representative party be a person who will fairly and adequately represent the class before certification may be granted. An essential component of adequate representation is that the party's attorney be qualified, experienced and able to conduct the litigation. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2nd Cir. 1968) (subsequent history omitted); *see* 3B Moore's Federal Practice ¶ 23.07[1]. While this Court has denied the motion to disqualify the plaintiff's counsel, see Section I, *supra*, adequacy of representation is a narrower

issue which is not governed by that ruling. *See Phillips*, 637 F.2d at 1023 n.14.

[App. 26] The School Board defendants maintain that 23(a)(4) is not met because the named plaintiff is mentally retarded and cannot even respond to simple questions at a deposition.[2]

Whether a named plaintiff and his counsel can adequately represent their proposed class is a question of fact. *Guerine v. J&W Investment Co.*, 544 F.2d 863 (5th Cir. 1977), and this Court has only the pleadings and memoranda of the parties (and a few scattered citations to unfiled depositions) before it at the present time. Therefore, it is hereby ordered that the plaintiff shall have twenty days from the date of this Order in which to submit evidence and a memorandum of law on the representation issues. After submission, the defendants shall have an additional ten days in which to reply. The Court defers ruling on the motion for an evidentiary hearing until it can be determined if there is any genuine doubt as to the 23(a)(4) issues. *Satterwhite v. City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978), *vacated on other grounds*, 100 S.Ct. 1334 (1980).

E. Class Relief

The plaintiff seeks certification of this action as a class action maintainable under Fed.R.Civ.P. 23(b)(2). That

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2. The School Board defendants also assert that this action is moot because the named plaintiff is no longer incarcerated at the Center. This, however, is an action where termination of a class representative's claim does not moot the claims of the class because the transitory nature of the alleged deprivations are " 'capable of repetition, yet evading review.' " Gerstein v. Pugh, 420 U.S. 103, 110 n.11. As long as the named plaintiff was a member of the class at the time the action was filed, mootness is avoided. *Id.*; Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980).

section provides only for class actions seeking injunctive or declaratory relief. The complaint here seeks both injunctive relief and money damages, and both sets of defendants have challenged the claims for damages in their memoranda opposing class certification.

[App. 27] The Court finds that the claims for injunctive relief are sufficient to meet the requirements of 23(b)(2). The Court, however, gives the defendants leave to challenge the damages claims by means of appropriate motions, if done so within twenty days of the date of this Order.

V. SUMMARY

It is therefore

ORDERED AND ADJUDGED as follows:

1. The HRS defendants' motion to disqualify is DENIED.

2. The plaintiff's motion to proceed anonymously is GRANTED.

3. The plaintiff's motion to compel is GRANTED and the HRS defendants' motion for a protective order is DENIED, except as outlined above.

4. The plaintiffs' motion for class certification and the motion by all defendants for an evidentiary hearing are DEFERRED, pending briefing on the issue of representation.

DONE AND ORDERED at Miami, Florida, this 18th day of June, 1981.

/s/ Edward B. Davis
United States District Judge

Copies To:
Counsel of Record

IN THE ~~CIRCUIT~~ CIRCUIT COURT OF ~~THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE~~ COUNTY, FLORIDA

NO. 81-9434-03 81-9434(03)

IN RE Alkin, Gerald
18 y/o w/m 8/0 8/19/63

PETITION FOR INVOLUNTARY PLACEMENT
AND PLACEMENT CERTIFICATE*

I, Dorothy Farrell/[illegible] as Administrator of [illegible] Memorial Hospital Institute
Facility and Address

hereby recommend that Gerald Alkin, a patient previously examined and evaluated, be placed in a treatment facility.

The said patient's designated representatives are:

	First Representative (Mother)	Second Representative (Father) / Guardian
Name	Ruth Alkin	Dr Alkin
Address	1249 La Manova Ave. Coral Gables, Fla. 33134	1249 La Manova Ave. Coral Gables Fla. 33134
Telephone	548-8510	548-8510

11/20, 1981 Dorothy Farrell/[illegible] Administrator

MENTAL HEALTH PROFESSIONAL'S (MHP) OPINION

I, Marcita [illegible], a mental health professional authorized to practice in the State of Florida, having personally examined Gerald Alkin on 11-19, 1981 within five (5) days of the signing hereof and find from such examination that (he) (she) is mentally ill, having been diagnosed as Schizophrenia, Paranoid Type, Chron.

and because of (his) (her) illness is [likely to injure (himself) (herself) or others if allowed to remain at liberty] or: [in need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and that such neglect or refusal poses a real and present threat of substantial harm to his well being].

As evidenced by: [illegible]

[illegible] 11/20, 1981 [illegible], M.H.P.

PHYSICIAN'S OPINION

I, [illegible] MD, a physician authorized to practice in the State of Florida, having personally examined Gerald Alkin on 11-20, 1981 within five (5) days of the signing hereof and find from such examination that (he) (she) is mentally ill, having been diagnosed as Schizophrenia, paranoid type

and because of (his) (her) illness is [likely to injure (himself) (herself) or others if allowed to remain at liberty] or: [in need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and that such neglect or refusal poses a real and present threat of substantial harm to his well being].

As evidenced by [illegible]

11-20, 1981 [illegible] M.D.

* The patient and his guardian or representatives shall receive copies of the Petition for Involuntary Placement Placement Certificate.

cc: Patient
Guardian) When applicable
First Representative)
Second Representative)

(By authority of Chapter 394.467 (2), Florida Statutes)

— FILED —
RICHARD P. BRINKER
CLERK
NOV 20 1981
CIRCUIT COURT
DADE COUNTY

HRS-[illegible] FORM XXXX, [illegible]

STATE OF FLORIDA

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES 81-9434(03)

Jackson Memorial Hospital Institute
FACILITY

Miami
FLORIDA

TO

IN RE Alelia Gerald
18 4/10 W/M D/O 8/19/63

NOTICE OF PETITION FOR
INVOLUNTARY PLACEMENT*

YOU ARE HEREBY NOTIFIED that a petition for a hearing has been filed with the

Circuit Court, Dade County, Florida on the question of whether Gerald Alelia should be ordered retained or confined for involuntary placement.

A patient may apply for voluntary placement.

A patient may waive hearing by executing and returning to the administrator the attached Waiver of Hearing. If said hearing is not waived within five (5) days from the date on the Petition for Involuntary Placement and Placement Certificate, the court shall be notified by the administrator to proceed with setting a time and place for a hearing.

A patient may be represented by counsel at the hearing and if financially unable to retain counsel, counsel will be appointed by the court upon return of the attached Application for Attorney fully executed by the patient, his guardian, or representative.

If the hearing is waived, the patient, his guardian or representative may apply at any time within six (6) months from the date of the Placement Certificate for a hearing on the need for placement by signing the attached Petition for Hearing and indicating the court of jurisdiction.

A Petition for Hearing may be filed with a court in the county in which the patient is placed at the time the certificate is executed. A list of courts and the judges' names for each county in the State is attached to enable the patient to direct his inquiries and file his petition in the appropriate place.

11/20/ 1981

Administrator

CERTIFICATE OF MAILING

I hereby certify that I mailed the above and foregoing notice to the named persons by depositing the same in the United States Post Office on 11/20 1981

* The patient and his guardian or representatives shall receive copies of the Petition for Involuntary Placement and Placement Certificate, Waiver of Hearing for Involuntary Placement, Petition for a Hearing for Involuntary Placement and Application for an Attorney with Notice of Petition for Involuntary Placement.

cc: Patient
Guardian
First Representative
Second Representative
When applicable

— FILED —
RICHARD P. BRINKER
CLERK
NOV 20 1981
CIRCUIT COURT
DADE COUNTY

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DADE COUNTY
PROBATE, GUARDIANSHIP AND TRUST DIVISION -- MENTAL HEALTH DEPARTMENT

No. 81-9434-03

TO: Gerald Alchin, Ruth Alchin
Don Alchin, Adm. Designee
Public Defender, State Atty.
Dr. Lerma, Dr. Moreno

IN RE: Gerald Alchin
PRESENTLY AT JACKSON MEMORIAL INSTITUTE

NOTICE OF HEARING ON PETITION FOR INVOLUNTARY PLACEMENT

(1) You are hereby notified that a hearing will be held on the pending Petition for Involuntary Placement of Gerald Alchin before the Honorable Lewis S. Kinler, GENERAL MASTER, at the JACKSON MEMORIAL INSTITUTE, 16TH TERR. N.W. & 12TH AVE., MIAMI, FL. at the Conference, room ____, on the 1st day of DECEMBER, 1981, at 9.00 a.m.

(2) The basis for this hearing, and the possible involuntary detention which may result therefrom are:

(a) Petition for Involuntary placement executed by Dorothy Darnell, Administrator designee, J.M. INSTITUTE (title) (agency)

alleging that Gerald Alchin, is mentally ill and because thereof is likely to injure himself or others unless involuntarily placed mentally ill and in need of care or treatment but lacks sufficient capacity to make a responsible application on his own behalf and cannot be adequately cared for by friends or family.

(b) Said petition is accompanied by the Certificates of two examining physicians supporting involuntary placement whose names and the substance of their certificate and proposed testimony is:

1. Margarita Lerma, M.D. Schizophrenia, paranoid type, chronic

2. Susan S. Moreno, M.D. Schizophrenia, paranoid type

(c) Other persons who are expected to testify in support of involuntary placement and the substance of their proposed testimony are:

Ruth and Don Alchin, parents, will testify as to patient's behavior

(3) A patient has the right to be represented by an attorney at the hearing and in preparation therefore, and if financially unable to retain one, the Court will appoint an attorney upon return of this Notice with the following Application for Attorney fully executed and sworn to by the patient, his guardian, or representative.

FRANCIS J. CHRISTY

App. 30

Judge

I, _____, hereby petition the Court to appoint an attorney to represent me in these proceedings.

I declare under penalty of perjury that I do not have assets of any kind for payment of attorney fees for such representation.

_____
(patient) (guardian) (representative)

Sworn to and subscribed before me, this ____day of_____, 197___.

_____
Notary Public

- -

(4) The patient has the right to an independent expert examination by a psychiatrist or psychologist, and if he cannot afford one, upon completion of the following Application for Medical Expert, the Court will appoint one upon return of this Notice, fully executed and sworn to by the patient, his guardian, or representative.

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APPLICATION FOR MEDICAL EXPERT*

I, _____, hereby petition the Court to appoint an independent expert to examine me prior to the above hearing.

I declare under penalty of perjury that I do not have assets of any kind for payment of an expert's fee for such examination.

_____
(patient) (guardian) (representative)

Sworn to and subscribed before me, this ____day of_____, 197___.

_____
Notary Public

- -

CERTIFICATE OF MAILING

I hereby certify that I mailed, except as noted, the above and foregoing notice to the named parties by depositing the same in the United States mail on the 3rd day of November, 1981

_____
Clerk

* The patient and his guardian or representatives and facility administrator shall receive Notice of Hearing, Application for Attorney, and Application for Medical Expert.

cc: Patient ( )
Facility Administrator)
Guardian) When Applicable
First Representative)
Second Representative)
State Attorney)

DMH-B A-10

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

NO 81-9434 (03)

IN RE: GERALD ALCHIN

ORDER APPOINTING COUNSEL

This matter being before the Court for consideration pursuant to Chapter 394—Part I, Florida Statutes, in which Gerald Alchin seeks the services of Court appointed counsel, and it being determined by the Court pursuant to affidavit filed herein that Gerald Alchin is unable to afford counsel, it is therefore

ORDERED

1. The Public Defender, an attorney practicing in Dade County, Florida, is hereby appointed counsel to represent Gerald Alchin in all pending matters under Chapter 394—Part I, Florida Statutes.

2. The County of Dade will pay reasonable attorney's fees to be determined after a hearing thereon by the Judge in Dade County, Florida.

ORDERED at Miami this 23rd day of November, 19 81

Judge
EDMUND W. NEWBOLD

FILED
RECORDS
CLERK CIRCUIT COURT
DADE COUNTY, FLORIDA

App. 32

(By authority of Chapter 394—Part I, Florida Statutes)

[App. 33]

AFFIDAVIT

STATE OF FLORIDA)
) ss:
COUNTY OF DADE)

The undersigned, being duly sworn deposes and says:

1. My name is Barry A. Weinstein. I am an Assistant Public Defender in the office of the Dade County Public Defender.

2. I am trial counsel in *G.A. v. PHT*, 80-2924-Civ-EBD. In initiating this federal law suit, it was my opinion that the conditions under which G.A. was confined at Jackson Memorial Hospital violated G.A.'s rights under the First, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, Sections 2, 4, 9, and 17 of Article I of The Florida Constitution, and Chapter 394, Florida Statutes.

3. The Public Defender has been appointed to represent G.A. on five separate occasions by circuit judges sitting in the probate and juvenile divisions of the Eleventh Judicial Circuit, Dade County, Florida.

4. I have filed a motion to renew application to proceed in *forma pauperis* in *G.A. v. PHT*, 80-2924-Civ.EBD. This motion is still pending.

/s/ Barry A. Weinstein
Barry A. Weinstein

SWORN TO and SUBSCRIBED
before me this 11th day of
December, 1981.

/s/ (Illegible)
Notary Public, State of Florida
at large

My Commission expires: May 23, 1984

(Filed December 29, 1981)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA, ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX and ARMANDO MERINO,
Relators,

vs.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,
Respondents.

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

Relators hereby reply to the response to order to show cause filed by Respondents and state the following:

1) The primary thrust of Respondents' argument seems to be twofold, that they have previously handled cases in similar postures to the case of G.A. et al. v. Public Health Trust of Dade County et al. and that the interests of society would be best served by allowing them to handle cases of such nature.

2) The first of these contentions is plainly without merit. Respondents' authority was not challenged in the proceedings to which they refer, so their handling of those cases can hardly be said to compel the conclusion that they are presently acting within the scope of their authority.

Moreover, the cases referred to by Respondents presented very different situations than is presented by the case they are now handling.

Perhaps the most significant difference between those cases and the case Respondents are now handling is that in those cases, Respondents instituted the suit at a time when the matters complained of affected their client. Here, Respondents' client had already been discharged and was not at all affected by the challenged practices at the time the suit was instituted. Thus, whatever validity there may be to the assertion that Respondents should be allowed to bring suits of this nature to correct conditions affecting their clients is of no applicability here.

Further, the cases cited by Respondents involved situations in which the proceeding instituted by Respondents was instituted at a time when Respondents were appointed to represent the party in question. Here, by contrast, Respondents' appointment had already terminated, since their appointment was only "in all pending matters under Chapter 394-Part I, Florida Statutes," (Appendix to Petition for a Writ of Quo Warranto [hereinafter referred to as "A"] 35), and since all such matters had been concluded before the filing of the federal suit.

The other obvious distinction between the cases Respondents previously instituted and the case now being litigated is that those cases involved the representation of persons facing criminal charges. Under such circumstances, the First District Court of Appeal, in a case upon which Respondents place a great deal of reliance, has upheld the Public Defender's right to bring suit to challenge conditions of confinement. *Graham v. Vann*, 394 So.2d 176 (Fla. 1st DCA 1981). Respondents' attempt to apply the reasoning of that case here must be rejected as the court's conclusion in that case was predicated on

Florida Rule of Criminal Procedure 3.111(b)(2), a rule which obviously does not come into play here, as no criminal proceeding ever existed. Additionally, *Graham v. Vann* dealt with a situation in which the Public Defender was appointed to do what he did, not one, as here, in which Respondents unilaterally filed the case, not only without appointment, but after their appointment had expired. Further, *Graham v. Vann* did not deal with an attempt to go into federal court, an attempt which for the reasons set forth in section IV(a) of the Petition for a Writ of Quo Warranto is not within the scope of Respondents' authority.

Respondents' only attempt to deal with these distinctions is to say that the principles of the rule of criminal procedure should also apply to situations in which the Public Defender is appointed to represent someone in a mental competency proceeding. Whether those principles should or should not apply is not relevant here, however. They apply to a situation only if a rule or statute specifically applies them and none exist as regards the present situation. Thus, whatever the merit of having such a rule or statute for the circumstances dealt with here, *Graham v. Vann, supra,* avails Respondents naught, since, quite simply, no provision comparable to the criminal rule exists.

3) The second primary thrust of Respondents' arguments deals with numerous policy reasons why they should be allowed to bring proceedings of the sort dealt with here. Indeed, strong policy arguments can be made both in support of and against this premise. Such arguments, however, are irrelevant here and should be directed to the legislature. The Public Defender has "no authority outside of that provided by statute." *Graham v. Vann, supra,* 394 So.2d at 177. This court's role in this case is therefore to determine whether Respondents' present representation

is within the scope of their existing statutory authority, *not* whether it should be. Thus, Respondents' reliance on the difficulty of other sources providing representation for persons in a situation similar to that of G.A. is nothing more than an emotional appeal which ignores the real question of Respondents' statutory authority. Respondents' arguments in this regard should thus be totally discounted.

Additionally, whatever force may attach to an argument that Respondents should be allowed to bring such suits because of their affect on other clients of Respondents does not change the appropriate conclusion. This is so for four reasons: (A) There exists no reason why a suit filed for such a purpose could not be filed while the party to the suit is affected by the practices. (B) The Public Defender had no other clients similarly situated in the proceedings with which this case is concerned, since G.A. was the only patient of the 46 being treated who was involuntarily committed. (A 71). (C) It is not likely that Respondents will usually have clients which are affected by the treatment in question since the 45-1 ratio is and has been over the years representative of the patient mix at the hospital. (A 71). Moreover, at least a reasonable number of the few involuntary patients will unquestionably be solvent. (Compare *Gerstein v. Pugh*, 420 U.S. 103, 111, n.11 (1975), where the Court noted that although the case was moot as to the named respondents, it was safe to assume that the Public Defender had other clients with a continuing live interest in the case.) (D) Whatever the attractiveness of Respondents' premise in a vacuum, the fact remains that any representation undertaken by Respondents must be authorized by statute and their present representation is not.

4) Several other points made by Respondents will also be replied to here.

5) The contention that Respondents are not representing G.A. as regards his damage claim can be dealt with by simply looking to the fact that the amended complaint seeking damages is submitted by Respondents and Eugene Zenobi. (A 120). There is no distinction drawn among the attorneys. Thus, it is clear that Respondents are among the attorneys of record for the damage claim as well as the original request for relief. If it was Respondents' desire that they not be involved in the damage claim, they should not have allowed Mr. Zenobi to participate in the suit, but should have told him to institute a separate suit for damages and perhaps seek consolidation. Under the circumstances that exist, however, it seems likely that Mr. Zenobi joined Respondents because Respondents were aware that the present request for quo warranto would be filed (Respondent Weinstein was so informed by the undersigned at a hearing in the federal case which occurred well before the filing of the amended complaint) and felt that it was probable that their continued representation would be precluded by this court.

In any event, it is clear that even though Mr. Zenobi may have actually prepared the changes in and additions to the complaint, Respondents are also representing G.A. as to the damages claim, representation which Respondents have at least implicitly conceded would be improper. The writ of quo warranto should thus clearly issue at least as to this aspect of Relators' claims.

One other point should also be briefly noted here. Mr. Zenobi's willingness to participate in the case demonstrates that perhaps the problems Respondents assert exist in providing representation for persons such as G.A. are not as insurmountable as Respondents would contend.

6) Respondents also point to the fact that cases of the sort dealt with here make up a small percentage of

their caseload. This fact is immaterial. If Respondents' representation is in excess of their authority, they should not be allowed to continue in such a manner. Moreover, given the caseload problems of Respondents' office (see Section VI of Petition for a Writ of Quo Warranto), even the handling of one case which Respondents should not be handling has an impact. Certainly, for instance, the time spent on the federal case with which this proceeding is concerned could have been utilized to prepare a brief in a capital case.

7) Respondents rely on the fact that the decision to file the federal complaint as a class action was a tactical one, based on the likelihood of obtaining relief for both G.A. and other individuals. The mere fact that a decision is tactical is of no import. Respondents still must have the authority to act and here they simply do not. Moreover, as discussed in paragraph three of this reply, Respondents had no other clients similarly situated and are not likely to have such clients at any given time.

8) In arguing that they believe their client to be indigent, Respondents rely on determinations made by the state circuit court at times other than that at which the federal court made its determination. Whether G.A. was indigent at those times has no bearing on the question of whether he is currently indigent or on how the court hearing the present case has ruled. The fact remains that the court before whom the proceeding in which Respondents' authority is being questioned is pending has determined that G.A. is not indigent. This determination must take priority over other determinations by other courts and precludes Respondents' representation.

9) Respondents' contention regarding access to the courts can be rejected with little discussion. Respon-

dents' clients are in no way denied access to the courts. They can file whatever proceedings they wish, either pro se or with whatever counsel they are able to obtain. To accept Respondents' claim is to say that access to the courts automatically includes an attorney at taxpayers expense in every case, civil or criminal, and to thus establish a civil public defender system, a concept which can be supported by no authority whatsoever. Even if such a concept could be supported, the obligation to provide such counsel in the federal courts would fall to the federal public defender, not the state public defender.

10) Respondents' assertions regarding ethical obligations are also without merit. The State is required to supply an attorney to persons in certain situations, but certainly not in the situation presented here. To accept Respondents' contention that they are ethically required to pursue matters in addition to those for which they are appointed is to extend ethical obligations to an unheard of and unrealistic point. Pursuing a civil suit in federal court in no way furthers Respondents' representation in state court in the matters for which they were appointed. The opinion in *Graham v. State*, 372 So.2d 1363 (Fla. 1979), relied upon by Respondents does not affect this conclusion. The reference cited by Respondents in that case is to continued pursuit in the federal courts of the same relief sought in the state courts. Moreover, it dealt with private attorneys appointed by the court, not public defenders, attorneys not bound by statutory requirements. It is also significant to realize that this court declined to allow those attorneys to receive compensation from state funds for their continued handling of the case, thus demonstrating that state funds in the form of public defender salaries should also not be so expended. Finally, in this regard, it should be realized that any ethical ob-

ligation would be fulfilled by referring a client to a private attorney such as Mr. Zenobi who could handle the case.

11) Respondents point to the case of *G.R. v. Taylor*, United States District Court, Southern District of Florida, Case no. 80-3021-CIV-EBD, and assert that it upheld the Public Defender's authority to bring a federal suit in light of a federal grant that office had received. The case is totally inapplicable here. In the first place, the grant expired prior to the institution of the case from which this proceeding arose. (Response to Order to Show Cause, p. 11). Moreover, the grant guidelines (a copy of which is attached to this reply) provide that the costs must "[b]e authorized or not prohibited under State or local laws or regulations." (p. 7). For the reasons set forth in the initial petition, this requirement is not met in Florida by bringing suits such as *G.R. v. Taylor*.

12) Respondents' only response to the challenge to their authority to litigate a moot case is to say that since the federal court has not yet ruled on the suggestion of mootness, the case is not moot. (Response, p. 4). This ignores the fact that the mootness argument Relators is making is premised initially on the conclusion that Respondents cannot seek damages. Since that claim has been added, it would appear that the federal proceeding as a whole is not moot. Since, however, Respondents cannot represent G.A. as to that aspect of the claim, and since the remaining claims are plainly moot, (Indeed, Respondents have not even challenged that assertion.), Respondents' efforts can have no practical effect and they are litigating a moot case. Respondents' statements regarding the letter from the undersigned to the federal judge are to say the least puzzling. The letter referred to the possibility of the case pending before *this* court becoming

moot, not the federal case. The letter is thus of no relevance here whatsoever.

13) Respondents contend that they are not representing plaintiff R.A. in the federal suit since *Federal Rule of Civil Procedure* 17 (c) requires that minors sue through an adult next friend. That rule, however, provides that "[a]n infant . . . *may* sue by his next friend . . . ." It is thus discretionary whether to sue by a next friend. Indeed, it has been held that it is proper to allow a minor to bring suit anonymously and not even notify her parents. *M.S. v. Wermers*, 557 F.2d 170, 176 (8th Cir. 1977). It is thus apparent that R.A. was not a necessary party. Respondents' representation of her is thus improper.

14) Respondents' attempts to circumvent Relators' claims are for the reasons discussed previously herein quite unpersuasive. It is significant to note that Respondents have not even attempted to answer the argument that they cannot represent a person in any proceeding without a specific appointment regarding that proceeding. (Petition for a Writ of Quo Warranto, p. 10). Their silence speaks volumes.

CONCLUSION

Respondents have relied upon a misdirected emotional appeal, a "squatter's rights" theory that because they have done something before, they are immune from challenge to their doing it again, and an attempt to apply principles which might arguably be applicable in criminal cases in which their client is actually affected and in which they were appointed to handle the case, conditions which do not exist here. Respondents' arguments cannot overcome the one basic principle applicable to each of the contentions set forth by Relators, that Respondents lack the statutory

authority to handle the federal case which gave rise to this proceeding. The writ should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Response to Order to Show Cause was furnished by mail to Parker D. Thomson, PAUL & THOMSON, 1300 Southeast First National Bank Building, Miami, Florida 33131, on this 28th day of December, 1981.

/s/ Anthony C. Musto
Anthony C. Musto
Assistant Attorney General

APPENDIX 1. TEXT OF OFFICE OF MANAGEMENT AND BUDGET CIRCULAR No. A-87

EXECUTIVE OFFICE OF THE PRESIDENT
Bureau of the Budget
Washington D.C. 20503

May 9, 1968 CIRCULAR NO. A-87

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Principles for determining costs applicable to grants and contracts with State and local governments

1. *Purpose.* This Circular promulgates principles and standards for determining costs applicable to grants and contracts with State and local governments. They are designed to provide the basis for a uniform approach to the problem of determining costs and to promote efficiency and better relationships between grantees and their Federal counterparts.

2. *Coverage.* This Circular applies to all Federal agencies responsible for administering programs that involve grants and contracts with State and local governments. However, it does not apply to grants and contracts with (a) publicly financed educational institutions subject to Bureau of the Budget Circular No. A-21, and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies. Any other exceptions will be approved by the Bureau of the Budget in particular cases where adequate justification is presented.

3. *Cost principles.* The principles to be followed in determining costs are set forth in Attachment A. Standards with respect to the allowability of selected items of cost are set forth in Attachment B.

4. *Effective date.* The principles will be applied at the earliest practicable date but not later than January 1, 1969, with respect to State governments and January 1, 1970, with respect to local governments. This arrangement will permit prompt implementation in programs where that is possible, but also allow time for study and development of necessary procedures in more complex programs.

Phillip S. Hughes
Acting Director

Attachments

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Attachment B - STANDARDS FOR SELECTED ITEMS OF COST

ATTACHMENT A
Circular No. A-87

PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO GRANTS AND CONTRACTS WITH STATE AND LOCAL GOVERNMENTS

A. *Purpose and scope.*

1. *Objectives.* This Attachment sets forth principles for determining the allowable costs of programs administered by State and local governments under grants from and contracts with the Federal Government. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of a particular grant. They are designed to provide that federally assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

2. *Policy guides.* The application of these principles is based on the fundamental premises that:

a. State and local governments are responsible for the efficient and effective administration of grant and contract programs through the application of sound management practices.

b. The grantee or contractor assumes the responsibility for seeing that federally assisted program funds have been expended and accounted for consistent with underlying agreements and program objectives.

c. Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for

employing whatever form of organization and management techniques may be necessary to assure proper and effcient administartion.

3. *Application.* These principles will be applied by all Federal agencies in determining costs incurred by State and local governments under Federal grants and cost reimbursement type contracts (including subgrants and subcontracts) except those with (a) publicly financed educational institutions subject to Bureau of the Budget Circular A-21, and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

B. *Definitions.*

1. *Approval or authorization of the grantor Federal agency* means documentation evidencing consent prior to incurring specific cost.

2. *Cost allocation plan* means the documentation identifying, accumulating, and distributing allowable costs under grants and contracts together with the allocation methods used.

[2]

3. *Cost*, as used herein, means cost as determined on a cash, accrual, or other basis acceptable to the Federal grantor agency as a discharge of the grantee's accountability for Federal funds.

4. *Cost objective* means a pool, center, or area established for the accumulation of cost. Such areas include organizational units, functions; objects or items of expense, as well as ultimate cost objectives including specific grants, projects, contracts, and other activities.

5. *Federal agency* means any department, agency, commission, or instrumentality in the executive branch of

the Federal Government which makes grants to or contracts with State or local governments.

6. *Grant* means an agreement between the Federal Government and a State or local government whereby the Federal Government provides funds or aid in kind to carry out specified programs, services, or activities. The principles and policies stated in this Circular as applicable to grants in general also apply to any federally sponsored cost reimbursement type of agreement performed by a State or local government, including contracts, subcontracts and subgrants.

7. *Grant program* means those activities and operations of the grantee which are necessary to carry out the purposes of the grant, including any portion of the program financed by the grantee.

8. *Grantee* means the department or agency of State or local government which is responsible for administration of the grant.

9. *Local unit* means any political subdivision of government below the State level.

10. *Other State or local agencies* means departments or agencies of the State or local unit which provide goods, facilities, and services to a grantee.

11. *Services*, as used herein, means goods and facilities, as well as services.

12. *Supporting services* means auxiliary functions necessary to sustain the direct effort involved in administering a grant program or an activity providing service to the grant program. These services may be centralized in the grantee department or in some other agency, and include procurement, payroll, personnel functions, maintenance and operation of space, data processing, accounting, budgeting, auditing, mail and messenger service, and the like.

C. *Basic guidelines.*

1. *Factors affecting allowability of costs.* To be allowable under a grant program, costs must meet the following general criteria:

a. Be necessary and reasonable for proper and efficient administration of the grant program, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State or local governments.

b. Be authorized or not prohibited under State or local laws or regulations.

c. Conform to any limitations or exclusions act forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items.

d. Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the grantee is a part.

e. Be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances.

f. Not be allocable to or included as a cost of any other federally financed program in either the current or a prior period.

g. Be net of all applicable credits.

2. *Allocable costs.*

a. A cost is allocable to a particular cost objective to the extent of benefits received by such objective.

b. Any cost allocable to a particular grant or cost objective under the principles provided for in this Circular may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

c. Where an allocation of joint cost will ultimately result in charges to a grant program, an allocation plan will be required as prescribed in section J.

3. *Applicable credits.*

a. Applicable credits refer to those receipts or reduction of expenditure-type transactions which offset or reduce expense items allocable to grants as direct or indirect costs. Examples of such transactions are: [4] purchase discounts; rebates or allowances, recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges.

b. Applicable credits may also arise when Federal funds are received or are available from sources other than the grant program involved to finance operations or capital items of the grantee. This includes costs arising from the use or depreciation of items donated or financed by the Federal Government to fulfill matching requirements under another grant program. These types of credits should likewise be used to reduce related expenditures in determining the rates or amounts applicable to a given grant.

D. *Composition of cost.*

1. *Total cost.* The total cost of a grant program is comprised of the allowable direct cost incident to its performance, plus its allocable portion of allowable indirect costs, less applicable credits.

2. *Classification of costs.* There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the grant or other ultimate cost objective. It is essential therefore that each item of cost be treated consistently either as a direct or an indirect cost. Specific guides for determining direct and indirect costs allocable under grant programs are provided in the sections which follow.

E. *Direct costs.*

1. *General.* Direct costs are those that can be identified specifically with a particular cost objective. These costs may be charged directly to grants, contracts, or to other programs against which costs are finally lodged. Direct costs may also be charged to cost objectives used for the accumulation of costs pending distribution in due course to grants and other ultimate cost objectives.

2. *Application.* Typical direct costs chargeable to grant programs are:

a. Compensation of employees for the time and effort devoted specifically to the execution of grant programs.

b. Cost of materials acquired, consumed, or expended specifically for the purpose of the grant.

c. Equipment and other approved capital expenditures.

d. Other items of expense incurred specifically to carry out the grant agreement.

e. Services furnished specifically for the grant program by other agencies, provided such charges are consistent with criteria outlined in Section G. of these principles.

F. *Indirect costs.*

1. *General.* Indirect costs are those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, without effort disproportionate to the results achieved. The term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities, to the grantee department. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect cost within a grantee department or in other agencies providing services to a grantee department. Indirect cost pools should be distributed to benefiting cost objectives on bases which will produce an equitable result in consideration of relative benefits derived.

2. *Grantee departmental indirect costs.* All grantee departmental indirect costs, including the various levels of supervision, are eligible for allocation to grant programs provided they meet the conditions set forth in this Circular. In lieu of determining the actual amount of grantee departmental indirect cost allocable to a grant program, the following methods may be used:

a. *Predetermined fixed rates for indirect costs.* A predetermined fixed rate for computing indirect costs applicable to a grant may be negotiated annually in situa-

tions where the cost experience and other pertinent facts available are deemed sufficient to enable the contracting parties to reach an informed judgment (1) as to the probable level of indirect costs in the grantee department during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect cost.

b. *Negotiated lump sum for overhead.* A negotiated fixed amount in lieu of indirect costs may be appropriate under circumstances where the benefits derived from a grantee department's indirect services cannot be readily determined as in the case of small, self-contained or isolated activity. When this method is used, a determination should be made that the amount negotiated will be approximately the same as the actual indirect cost that may be incurred. Such amounts negotiated in lieu of indirect costs will be treated as an offset to total indirect expenses of the grantee department before allocation to remaining activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

[6]

3. *Limitation on indirect costs.*

a. Federal grants may be subject to laws that limit the amount of indirect cost that may be allowed. Agencies that sponsor grants of this type will establish procedures which will assure that the amount actually allowed for indirect costs under each such grant does not exceed the maximum allowable under the statutory limitation or the amount otherwise allowable under this Circular, whichever is the smaller.

b. When the amount allowable under a statutory limitation is less than the amount otherwise allocable as

indirect costs under this Circular, the amount not recoverable as indirect costs under a grant may not be shifted to another federally sponsored grant program or contract.

G. *Cost incurred by agencies other than the grantee.*

1. *General.* The cost of service provided by other agencies may only include allowable direct costs of the service plus a prorata share of allowable supporting costs (section B.12.) and supervision directly required in performing the service, but not supervision of a general nature such as that provided by the head of a department and his staff assistants not directly involved in operations. However, supervision by the head of a department or agency whose sole function is providing the service furnished would be an eligible cost. Supporting costs include those furnished by other units of the supplying department or by other agencies.

2. *Alternative methods of determining indirect cost.* In lieu of determining actual indirect cost related to a particular service furnished by another agency, either of the following alternative methods may be used provided only one method is used for a specific service during the fiscal year involved.

a. *Standard indirect rate.* An amount equal to ten percent of direct labor cost in providing the service performed by another State agency (excluding overtime, shift, or holiday premiums and fringe benefits) may be allowed in lieu of actual allowable indirect cost for that service.

b. *Predetermined fixed rate.* A predetermined fixed rate for indirect cost of the unit or activity providing service may be negotiated as set forth in section F.2.a.

H. *Cost incurred by grantee department for others.*

1. *General.* The principles provided in section G. will also be used in determining the cost of services provided by the grantee department to another agency.

J. *Cost allocation plan.*

1. *General.* A plan for allocation of costs will be required to support the distribution of any joint costs related to the grant program. All costs [8] included in the plan will be supported by formal accounting records which will substantiate the propriety of eventual charges.

2. *Requirements.* The allocation plan of the grantee department should cover all joint costs of the department as well as costs to be allocated under plans of other agencies or organizational units which are to be included in the costs of federally sponsored programs. The cost allocation plans of all the agencies rendering services to the grantee department, to the extent feasible, should be presented in a single document. The allocation plan should contain, but not necessarily be limited to, the following:

a. The nature and extent of services provided and their relevance to the federally sponsored programs.

b. The items of expense to be included.

c. The methods to be used in distributing cost.

3. *Approval of cost allocation plan.* The allocation plan for a given cost area or objective will serve all the Federal agencies involved.

a. At the State level, the Department of Health, Education, and Welfare will be responsible for the negotiation and approval of the cost allocation plans for central support services to grant programs. The approved plans will be accepted by other Federal agencies, unless an

agency determines that the approved plan would result in significant inequitable or improper charges to programs for which it is responsible. The Department of Health, Education, and Welfare will collaborate with the other Federal agencies concerned in the development of guidance material concerning the cost allocation plan and in the negotiation and approval of the plan. It will also collaborate with the States concerning procedures for the administration of the cost allocation plan. The Department of Health, Education, and Welfare will be responsible for the audit of costs resulting from the cost allocation plan, the results of which will be accepted by other Federal agencies.

b. At the grantee department level in a State, and for local governments, Federal agencies will work towards the objective of designating a single Federal agency, the one with predominant interest, which will have responsibility similar to that set forth in a. above for the negotiation and approval of the cost allocation plan and for the audit of costs.

[1]

ATTACHMENT B

STANDARDS FOR SELECTED ITEMS OF COST

A. *Purpose and applicability.*

1. *Objective.* This Attachment provides standards for determining the allowability of selected items of costs.

2. *Application.* These standards will apply irrespective of whether a particular item of cost is treated as direct or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable, rather determination of allowability in each case should be based on the treatment

of standards provided for similar or related items of cost. The allowability of the selected items of cost is subject to the general policies and principles stated in Attachment A of this Circular.

B. *Allowable costs.*

1. *Accounting.* The cost of establishing and maintaining accounting and other information systems required for the management of grant programs is allowable. This includes cost incurred by central service agencies for these purposes. The cost of maintaining central accounting records required for overall State or local government purposes, such as appropriation and fund accounts by the Treasurer, Comptroller, or similar officials, is considered to be a general expense of government and is not allowable.

2. *Advertising.* Advertising media includes newspapers, magazines, radio and television programs, direct mail, trade papers, and the like. The advertising costs allowable are those which are solely for:

a. Recruitment of personnel required for the grant program.

b. Solicitation of bids for the procurement of goods and services required.

c. Disposal of scrap or surplus materials acquired in the performance of the grant agreement.

d. Other purposes specifically provided for in the grant agreement.

3. *Advisory councils.* Costs incurred by State advisory councils or committees established pursuant to Federal requirements to carry out grant programs are allowable. The cost of like organizations is allowable when provided for in the grant agreement.

4. *Audit service.* The cost of audits necessary for the administration and management of functions related to grant programs is allowable.

[2]

5. *Bonding.* Costs of premiums on bonds covering employees who handle grantee agency funds are allowable.

6. *Budgeting.* Costs incurred for the development, preparation, presentation, and execution of budgets are allowable since these are costs of general government. However, where employees of the central budget office actively participate in the grantee agency's budget process, the cost of identifiable services is allowable.

7. *Building lease management.* The administrative cost for lease management which includes review of lease proposals, maintenance of a list of available property for lease, and related activities is allowable.

8. *Central stores.* The cost of maintaining and operating a central stores organization for supplies, equipment, and materials used either directly or indirectly for grant programs is allowable.

9. *Communications.* Communication costs incurred for telephone calls or service, telegraph, teletype service, wide area telephone service (WATS), centrex, telpak (tie lines), postage, messenger service and similar expenses are allowable.

10. *Compensation for personal services.*

a. *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under the grant agreement, including but not necessarily limited to wages, salaries, and supplementary compensation and

benefits (section B.13.). The costs of such compensation are allowable to the extent that total compensation for individual employees: (1) is reasonable for the services rendered, (2) follows an appointment made in accordance with State or local government laws and rules and which meets Federal merit system or other requirements, where applicable; and (3) is determined and supported as provided in b. below. Compensation for employees engaged in federally assisted activities will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the State or local government. In cases where the kinds of employees required for the federally assisted activities are not found in the other activities of the State or local government, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

b. *Payroll and distribution of time.* Amounts charged to grant programs for personal services, regardless of whether treated as direct or indirect costs, will be based on payrolls documented and approved in accordance with generally accepted practice of the State or local agency. Payrolls [3] must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

11. *Depreciation and use allowances.*

a. Grantees may be compensated for the use of buildings, capital improvements, and equipment through

use allowances or depreciation. Use allowances are the means of providing compensation in lieu of depreciation or other equivalent costs. However, a combination of the two methods may not be used in connection with a single class of fixed assets.

b. The computation of depreciation or use allowance will be based on acquisition cost. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used in the computation. The computation will exclude the cost or any portion of the cost of buildings and equipment donated or borne directly or indirectly by the Federal Government through charges to Federal grant programs or otherwise, irrespective of where title was originally vested or where it presently resides. In addition, the computation will also exclude the cost of land. Depreciation or a use allowance on idle or excess facilities is not allowable, except when specifically authorized by the grantor Federal agency.

c. Where the depreciation method is followed, adequate property records must be maintained, and any generally accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific asset or class of assets for all affected federally sponsored programs and must result in equitable charges considering the extent of the use of the assets for the benefit of such programs.

d. In lieu of depreciation, a use allowance for buildings and improvements may be computed at an annual rate not exceeding two percent of acquisition cost. The use allowance for equipment (excluding items properly capitalized as building cost) will be computed at an annual rate not exceeding six and two-thirds percent of acquisition cost of usable equipment.

e. No depreciation or use charge may be allowed on any assets that would be considered as fully depreciated, provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

[4]

12. *Disbursing service.* The cost of disbursing grant program funds by the Treasurer or other designated officer is allowable. Disbursing services cover the processing of checks or warrants, from preparation to redemption, including the necessary records of accountability and reconciliation of such records with related cash accounts.

13. *Employee fringe benefits.* Costs identified under a. and b. below are allowable to the extent that total compensation for employees is reasonable as defined in section B.10.

a. Employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, court leave, military leave, and the like, if they are: (1) provided pursuant to an approved leave system, and (2) the cost thereof is equitably allocated to all related activities, including grant programs.

b. Employee benefits in the form of employers' contribution or expenses for social security, employees' life and health insurance plans, unemployment insurance coverage, workmen's compensation insurance, pension plans,

severance pay, and the like, provided such benefits are granted under approved plans and are distributed equitably to grant programs and to other activities.

14. *Employee morale, health and welfare costs.* The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employees' counseling services, employee information publications, and any related expenses incurred in accordance with general State or local policy, are allowable. Income generated from any of these activities will be offset against expenses.

15. *Exhibits.* Costs of exhibits relating specifically to the grant programs are allowable.

16. *Legal expenses.* The cost of legal expenses required in the administration of grant programs is allowable. Legal services furnished by the chief legal officer of a State or local government or his staff solely for the purpose of discharging his general responsibilities as legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government are unallowable.

17. *Maintenance and repair.* Costs incurred for necessary maintenance, repair, or upkeep of property which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable.

[5]

18. *Materials and supplies.* The cost of materials and supplies necessary to carry out the grant programs is allowable. Purchases made specifically for the grant program should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the grantee. Withdrawals from

general stores or stockrooms should be charged at cost under any recognized method of pricing consistently applied. Incoming transportation charges are a proper part of material cost.

19. *Memberships, subscriptions and professional activities.*

a. *Memberships.* The cost of membership in civic, business, technical and professional organizations is allowable provided: (1) the benefit from the membership is related to the grant program, (2) the expenditure is for agency membership, (3) the cost of the membership is reasonably related to the value of the services or benefits received, and (4) the expenditure is not for membership in an organization which devotes a substantial part of its activities to influencing legislation.

b. *Reference material.* The cost of books, and subscriptions to civic, business, professional, and technical periodicals is allowable when related to the grant program.

c. *Meetings and conferences.* Costs are allowable when the primary purpose of the meeting is the dissemination of technical information relating to the grant program and they are consistent with regular practices followed for other activities of the grantee.

20. *Motor pools.* The costs of a service organization which provides automobiles to user grantee agencies at a mileage or fixed rate and/or provides vehicle maintenance, inspection and repair services are allowable.

21. *Payroll preparation.* The cost of preparing payrolls and maintaining necessary related wage records is allowable.

22. *Personnel administration.* Costs for the recruitment, examination, certification, classification, training, es-

tablishment of pay standards, and related activities for grant programs, are allowable.

23. *Printing and reproduction.* Cost for printing and reproduction services necessary for grant administration, including but not limited to forms, reports, manuals, and informational literature, are allowable. Publication costs of reports or other media relating to grant program accomplishments or results are allowable when provided for in the grant agreement.

24. *Procurement service.* The cost of procurement service, including solicitation of bids, preparation and award of contracts, and all phases of contract administration in providing goods, facilities and services for grant programs, is allowable.

[6]

25. *Taxes.* In general, taxes or payments in lieu of taxes which the grantee agency is legally required to pay are allowable.

26. *Training and education.* The cost of in-service training, customarily provided for employee development which directly or indirectly benefits grant programs is allowable. Out-of-service training involving extended periods of time is allowable only when specifically authorized by the grantor agency.

27. *Transportation.* Costs incurred for freight, cartage, express, postage and other transportation costs relating either to goods purchased, delivered, or moved from one location to another are allowable.

28. *Travel.* Travel costs are alowable for expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business incident to a grant program. Such costs may be

charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in nonfederally sponsored activities. The difference in cost between first-class air accommodations and less-than-first-class air accommodations is unallowable except when less-than-first-class air accommodations are not reasonably available.

C. *Costs allowable with approval of grantor agency.*

1. *Automatic data processing.* The cost of data processing services to grant programs is allowable. This cost may include rental of equipment or depreciation on grantee-owned equipment. The acquisition of equipment, whether by outright purchase, rental-purchase agreement or other method of purchase, is allowable only upon specific prior approval of the grantor Federal agency as provided under the selected item for capital expenditures.

2. *Building space and related facilities.* The cost of space in privately or publicly owned bulidings used for the benefit of the grant program is allowable subject to the conditions stated below. The total cost of space, whether in a privately or publicly owned building, may not exceed the rental cost of comparable space and facilities in a privately owned building in the same locality. The cost of space procured for grant program usage may not be charged to the program for periods of nonoccupancy, without authorization of the grantor Federal agency.

a. *Rental cost.* The rental cost of space in a privately owned building is allowable.

b. *Maintenance and operation.* The cost of utilities, insurance, security, janitorial services, elevator ser-

vice, upkeep of grounds, normal repairs and alterations and the like, are allowable to the extent they are not otherwise included in rental or other charges for space.

[7]

c. *Rearrangements and alterations.* Cost incurred for rearrangement and alteration of facilities required specifically for the grant program or those that materially increase the value or useful life of the facilities (section C.3.) are allowable when specifically approved by the grantor agency.

d. *Depreciation and use allowances on publicly owned buildings.* These costs are allowable as provided in section B.11.

e. *Occupancy of space under rental-purchase or a lease with option-to-purchase agreement.* The cost of space procured under such arrangements is allowable when specifically approved by the Federal grantor agency.

3. *Capital expenditures.* The cost of facilities, equipment, other capital assets, and repairs which materially increase the value or useful life of capital assets is allowable when such procurement is specifically approved by the Federal grantor agency. When assets acquired with Federal grant funds are (a) sold, (b) no longer available for use in a federally sponsored program, or (c) used for purposes not authorized by the grantor agency, the Federal grantor agency's equity in the asset will be refunded in the same proportion as Federal participation in its cost. In case any assets are traded on new items, only the net cost of the newly acquired assets is allowable.

4. *Insurance and indemnification.*

a. Costs of insurance required, or approved and maintained pursuant to the grant agreement, is allowable.

b. Costs of other insurance in connection with the general conduct of activities is allowable subject to the following limitations:

(1) Types and extent and cost of coverage will be in accordance with general State or local government policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property is unallowable except to the extent that the grantor agency has specifically required or approved such costs.

c. Contributions to a reserve for a self-insurance program approved by the Federal grantor agency are allowable to the extent that the type of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks.

d. Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the grant agreement. However, costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and [8] minor losses not covered by insurance, such as spoilage, breakage and disappearance of small hand tools which occur in the ordinary course of operations, are allowable.

e. *Indemnification* includes securing the grantee against liabilities to third persons and other losses not compensated by insurance or otherwise. The Government is obligated to indemnify the grantee only to the extent expressly provided for in the grant agreement, except as provided in d. above.

5. *Management studies.* The cost of management studies to improve the effectiveness and efficiency of grant management for ongoing programs is allowable except that the cost of studies performed by agencies other than the grantee department or outside consultants is allowable only when authorized by the Federal grantor agency.

6. *Preagreement costs.* Costs incurred prior to the effective date of the grant or contract, whether or not they would have been allowable thereunder if incurred after such date, are allowable when specifically provided for in the grant agreement.

7. *Professional services.* Cost of professional services rendered by individuals or organizations not a part of the grantee department is allowable subject to such prior authorization as may be required by the Federal grantor agency.

8. *Proposal costs.* Costs of preparing proposals on potential Federal Government grant agreements are allowable when specifically provided for in the grant agreement.

D. *Unallowable costs.*

1. *Bad debts.* Any losses arising from uncollectible accounts and other claims, and related costs, are unallowable.

2. *Contingencies.* Contributions to a contingency reserve or any similar provision for unforeseen events are unallowable.

3. *Contributions and donations.* Unallowable.

4. *Entertainment.* Costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodgings, rentals, transportation, and gratuities, are unallowable.

5. *Fines and penalties.* Costs resulting from violations of, or failure to comply with Federal, State and local laws and regulations are unallowable.

[9]

6. *Governor's expenses.* The salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision are considered a cost of general State or local government and are unallowable.

7. *Interest and other financial costs.* Interest on borrowings (however represented), bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in connection therewith, are unallowable except when authorized by Federal legislation.

8. *Legislative expenses.* Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction, are unallowable.

9. *Underrecovery of costs under grant agreements.* Any excess of cost over the Federal contribution under one grant agreement is unallowable under other grant agreements.

(Filed January 3, 1983)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,376

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX and ARMANDO MERINO,
Relators,

vs.

BENNETT BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida, and BARRY WEINSTEIN and WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit Florida
Respondents.

MOTION FOR REHEARING OR CLARIFICATION OF DECISION

Pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, Respondent Brummer moves this Court for rehearing or clarification of its decision issued December 16, 1982. The decision states that a Public Defender cannot bring a class suit on behalf of a class which could include persons who are non-indigent and whom he has not been appointed to represent. The decision also states that the Public Defender, in the exercise of his independent professional judgment as to the necessity and appropriateness thereof, may bring direct or collateral civil actions on behalf of a named indigent in either state or federal court in continuation of pending representation of that indigent. The opinion thus appears to conclude that a Public Defender may bring (if in the exercise of his professional

judgment he finds it necessary or appropriate to the continued representation of his client's legal interest),

(1) civil actions under 42 U.S.C. § 1983, and,

(2) civil actions on behalf of a class,

as long as the action is on behalf of, and the class is composed exclusively of, persons whom the courts have appointed the Public Defender to represent.

Clarification of this point is sought because (i) on the date of issuance of the decision this Court also issued its decision in *State ex. rel. Smith v. Jagger*, Fla. Sup. Ct. No. 61,930 (December 16, 1982) ("*Jagger*") "on the authority" of the decision in this case and (ii) this decision (as well as *Jagger*) affects *all* Public Defenders.

The apparent teaching of the *Jagger* decision in the context of the decision here is that a public defender may not bring a civil action under the Florida Public Records Law (Chapter 119, Florida Statutes) action in his own name and may bring such action only if, in the exercise of his professional judgment, he determines such civil action is necessary or appropriate in continuation of his representation of a client whom he has been appointed to represent.

The Public Defender submits that the Court should clarify its decision by amending the fifth paragraph from the end of the decision to read (addition underscored):

> This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief on an "individual" basis. A lawyer's professional responsibility may dictate this action. It is however our view that a state court could mandate this action. *On the other hand, where the public defender, in the exercise of his professional*

judgment, finds it necessary or appropriate to file a civil action in state or federal court under 42 U.S.C. § 1983 or any statute on behalf of an indigent he is appointed to represent or a class of such persons he has been appointed to represent, such judgment is not subject to interference by the state.

ARGUMENT

I. THE DECISION PERMITS THE PUBLIC DEFENDER TO BRING DIRECT CIVIL ACTIONS ON BEHALF OF NAMED INDIGENTS IN EITHER STATE OR FEDERAL COURT

Although the Quo Warranto Petition argued that the Public Defender "has no authority to institute a civil proceeding in either state or federal court" (Quo Warranto Petition, at 7), the decision appears to reject this argument. Indeed, the entire thrust of the decision seems to be simply that the Public Defender cannot undertake representation of a class consisting of non-indigents whom the Public Defender has not been appointed to represent. Moreover, the decision repeatedly emphasizes that "[t]he state is constitutionally obliged to respect the professional independence of the Public Defenders whom it engages" and that:

> . . . an indispensable element of the effective performance of [the Public Defender's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. [quoting from *Polk County v. Dodson*, 102 S.Ct. 445, 450 n. 8 (1981) and *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)].

The decision as to whether to institute collateral legal proceedings which are deemed necessary or appropriate to continue full representation of an existing client is the

very essence of the exercise of independent professional judgement. Finally, as has been pointed out to this Court, the Public Defender has filed civil actions on behalf of named indigents in both state and federal court. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103 (1975); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc); *Lowery v. Metropolitan Dade County*, 43 Fla.Supp. 84 (Fla. 11th Cir., 1971).

II. THE DECISION PERMITS THE PUBLIC DEFENDER TO BRING SUCH ACTIONS UNDER 42 U.S.C. § 1983

In addition to upholding the authority of the Public Defender to maintain civil actions on behalf of named indigents in the exercise of his independent professional judgment, the decision necessarily holds that such suits may be brought under 42 U.S.C. § 1983 whenever appropriate since the choice of statutory remedy is as much an exercise of independent professional judgment as the decision to bring the action itself. As has been pointed out to this Court, the Public Defender has filed many civil actions under 42 U.S.C. § 1983. This Court should clarify that the Public Defender is free to do so when, in exercise of his independent professional judgment, he deems such action necessary or appropriate to continued representation of an existing client.

III. THE DECISION APPARENTLY PERMITS THE PUBLIC DEFENDER TO REPRESENT A CLASS WHICH IS COMPOSED EXCLUSIVELY OF INDIGENTS WHOM HE HAS BEEN APPOINTED TO REPRESENT

Although the decision makes clear the Public Defender cannot undertake representation of a class which includes persons who are non-indigent whom he has not been ap-

pointed to represent, the decision also apparently permits the Public Defender to maintain a class action as long as such class consists exclusively of indigents whom he has been appointed to represent.

While the decision makes clear the Public Defender is limited to representation of individuals whom he has been appointed to represent while representing them his exercise of professional judgment cannot constitutionally be curtailed or limited by the State of Florida. In the exercise of his independent professional judgment, the Public Defender may find it necessary to seek class relief for a class composed solely of Public Defender clients where the claim raises common questions of law or fact and otherwise meets the criteria for class representation set forth in Fla.R.Civ.P. 1.220 and F.R.Civ.P. 23.

CONCLUSION

For the foregoing reasons, this Court should clarify its decision by adopting the recommended supplemental language.

Paul & Thomson
/s/ Parker D. Thomson
by Robert Ciutron
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing Or Clarification Of Decision was served by mail this 31st day of December, 1982, upon the following:

Anthony C. Musto
Assistant Attorney General
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/s/ Parker D. Thomson
by Robt (Illegible)

(Filed January 11, 1982)

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January 6, 1982

Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

State of Florida, ex rel. Jim Smith, et al. v. Bennett Brummer, et al.; Case Number 61,376

Dear Mr. White:

Pursuant to Rule 9.210(g) Florida Rules of Appellate Procedure, we wish to bring to the attention of the Supreme Court the decision of the United States Supreme Court in *Polk County v. Dodson*, 50 U.S.L.W. 4077 (December 14, 1981) (copy enclosed), entered since the filing of Respondent's Response in this matter. The *Dodson* decision is relevant in the following respects:

1. In determining a public defender does *not* act pursuant to state law so that his actions are cognizable under 42 U.S.C. §1983, the United States Supreme Court

made clear the personal nature of a public defendant's activities in *opposition* to the position of the State:

> Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are "officers of the court." . . . In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client." This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed. (at pp. 4078-9)

In this regard the Court quoted from *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979):

> His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. (at p. 4079, fn. 8)

2. The Supreme Court in *Dodson* specifically concluded that public defenders may not be controlled by the State in execution of their professional responsibilities:

> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his case-

> load. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *United States v. Moore*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. (at pp. 4079)

3. Only total independence of public defenders in execution of their professional responsibilities meet the State's constitutional obligation to provide independent counsel to indigents:

> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), established the right of State criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." *Id.*, at 345, *quoting Powell v. Alabama*, 287 U.S. 45, 69 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of State control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, *e.g.*, *Gideon v. Wainwright*, *supra*; *Holloway v. Arkansas*, 435 U.S. 475 (1978). (at pp. 4079-80)

4. Finally, Chief Justice Burger, concurring, made the salient observation:

> Under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government.

It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out. *The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived.* (Emphasis supplied) (at p. 4081)

Sincerely,

/s/ Parker D. Thomson

PDT:pm

cc: Anthony Musto
Assistant Attorney General

bcc: Bennett H. Brummer
Barry Weinstein
William Ploss
Jonathan P. Rossman

POLK COUNTY, ET AL., PETITIONERS *v.* RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Syllabus

No. 80-824. Argued October 13, 1981—Decided December 14, 1981

Respondent brought suit in Federal District Court under 42 U. S. C. § 1983 against petitioners Polk County, its Offender Advocate, its Board of Supervisors, and Martha Shepard, an attorney in the Offender Advocate's office. As the factual basis for his lawsuit, respondent alleged that Shepard, who had been assigned to represent him in an appeal of a criminal conviction to the Iowa Supreme Court, failed to represent him adequately since she had moved for permission to withdraw as counsel on the ground that respondent's claims were legally frivolous. The Iowa Supreme Court granted Shepard's motion and dismissed respondent's appeal. In the District Court, respondent alleged that Shepard's actions violated certain of his constitutional rights. To establish that Shepard acted "under color of state law," a jurisdictional requisite for a § 1983 action, respondent relied on her employment by the county. The District Court dismissed the claims against all of the petitioners, but the Court of Appeals reversed.

Held:

1. A public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. Because it was based on

such activities, the complaint against Shepard must be dismissed.

(a) From the moment of Shepard's assignment to represent respondent, their relationship became identical to that existing between any other lawyer and client, except for the source of Shepard's payment. The legal system posits that a defense lawyer best serves the public, not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client. This is essentially a private function for which state office and authority are not needed.

(b) Cases in which this Court assumed that state-employed doctors serving in supervisory capacities at state institutions could be held liable under § 1983 are not controlling. *O'Connor v. Donaldson*, 422 U. S. 563, and *Estelle v. Gamble*, 429 U. S. 97, distinguished.

(c) Although the employment relationship between the State and a public defender is a relevant factor, it is insufficient to establish that a public defender acts under color of state law within the meaning of § 1983. A public defender is not amenable to administrative direction in the same sense as other state employees. And equally important, it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages.

(d) It is the ethical obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals. Respondent has no legitimate complaint that Shepard failed to prosecute a frivolous appeal on his behalf.

2. Respondent has not alleged unconstitutional action by Polk County, its Offender Advocate, or its Board of Supervisors. To the extent that his claims rest on a *respondeat superior* theory of liability, they fail to present a claim under § 1983. And a constitutional tort actionable under § 1983 is not described by the bald allegations that Shepard had injured respondent while acting pursuant to administrative rules and procedures and that the county "retains and maintains, advocates out of law school" who have on numerous occasions moved to withdraw from appeals of convictions. Respondent failed to allege any administrative policy that arguably caused a violation of his rights under the Sixth, Eighth, or Fourteen Amendments. An official policy of withdrawal from frivolous cases would not violate the Constitution.

628 F. 2d 1104, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, MARSHALL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C.J., filed a concurring opinion. BLACKMUN, J., filed a dissenting opinion.

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a public defender acts "under color of state law" when representing an indigent defendant in a state criminal proceeding.

I

This case arose when the respondent Russell Richard Dodson filed a *pro se* complaint in the United States District Court for the Southern District of Iowa. Dodson brought the action in federal court under 42 U. S. C. § 1983. As the factual basis for his lawsuit Dodson alleged

that Martha Shepard, an attorney in the Polk County Offender Advocate's office, had failed to represent him adequately in an appeal to the Iowa Supreme Court.[1]

A full-time employee of the County, Shepard had been assigned to represent Dodson in the appeal of a conviction for robbery. After inquiring into the case, however, she moved for permission to withdraw as counsel on the ground that Dodson's claims were wholly frivolous.[2] Shepard accompanied her motion with an affidavit explaining this conclusion. She also filed a memorandum summarizing Dodson's claims and the supporting legal arguments. On

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1. According to findings made in the District Court, "[t]he Offender Advocate is the independent creation of the Polk County Board of Supervisors. It or one of its lawyers is appointed by the court to represent indigent defendants. It has a salaried lawyer director and several full time salaried lawyers. It has fully funded by Polk County." *Dodson v. Polk County*, 483 F. Supp. 347, 349, n. 2 (SD Iowa 1979). The office handles about 2,500 cases per year.

2. She did so pursuant to Rule 104 of the Iowa Rules of Appellate Procedure, which provides in pertinent part:

"(a) If counsel appointed to represent a convicted indigent defendant in an appeal to the Supreme Court is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the Supreme Court in writing to withdraw. The motion must be accompanied by a brief refering to anything in the record that might arguably support the appeal."

Rule 104 also provides that prior to filing any motion to withdraw, the lawyer must advise his client in writing of his intention to do so. The client then has 30 days in which to notify the Supreme Court if he still wishes to proceed with the appeal. If the client does not communicate with the Supreme Court, the motion will be granted and the appeal dismissed. If the client does express a desire to proceed, the Supreme Court will review the legal points raised. If the Court finds them not to be frivolous, "it may grant counsel's motion to withdraw but will prior to submission of the appeal afford the indigent the assistance of new counsel, to be appointed by the trial court." Iowa Rule App. Proc. 104 (f).

The Iowa procedure is very similar to that prescribed by this Court in *Anders v. California*, 386 U. S. 738 (1967).

November 9, 1979, the Iowa Supreme Court granted the motion to withdraw and dismissed Dodson's appeal.

In his complaint in the District Court the respondent alleged that Shepard's actions, especially her motion to withdraw, had deprived him of his right to counsel, subjected him to cruel and unusual punishment, and denied him due process of law.[3] He sought injunctive relief as well as damages in the amount of $175,000. To establish that Shepard acted "under color of state law," a jurisdictional requisite for a § 1983 action, Dodson relied on her employment by the county. Dodson also sued Polk County, the Polk County Offender Advocate, and the Polk County Board of Supervisors. He alleged that the Offender Advocate and the Board of Supervisors had established the rules and procedures that Shepard was bound to follow in handling criminal appeals.

The District Court dismissed Dodson's claims against all defendants. *Dodson v. Polk County*, 483 F. Supp. 347 (SD Iowa 1979). It held that the relevant actions by Shepard had not occurred under color of state law. Canvassing the leading authorities, it reasoned that a public defender owes a duty of undivided loyalty to his client. A public defender therefore could not be sued as an agent of the State. The District Court dismissed the Offender Advocate's Office from the suit on the same theory. It also held that Dodson's complaint failed to allege the requisite personal involvement to state a § 1983 claim against Polk County and the Board of Supervisors.

The Court of Appeals for the Eighth Circuit reversed. *Dodson v. Polk County*, 628 F. 2d 1104 (CA8 1980). Like the District Court, it assumed that a public defender owed

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3. Dodson also asserted pendent claims for malpractice and breach of an oral promise to prosecute the appeal.

his client the same responsibility as any other attorney. In its view, however, the "dispositive point" was that Iowa Offender Advocates were "employees of the County," which was "merely a creature of the State." Whether public defenders receive instructions from county officials was "beside the point." "Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them." *Id.*, at 1106. In holding as it did on this issue, the court recognized that its decision conflicted with the holdings of a number of other Courts of Appeals. Reasoning that Dodson's *pro se* complaint should be liberally construed, the court also ordered reinstatement of the § 1983 claims against the Offender Advocate and the Board of Supervisors. The question of their involvement was left for factual development in the District Court. In addition, the court ordered that Dodson be given an opportunity on remand to state his claim against the County with greater specificity. Finally, the court rejected the argument that a public defender should enjoy the same immunity provided to judges and prosecutors. It held that the defendants were entitled to a defense of "good faith," but not of "'absolute" immunity

One member of the panel filed a dissent. The dissent argued that a person acts under color of state law only when exercising powers created by the authority of the State. In this case, it reasoned, the alleged wrongs were not made possible only because the defendant was a public defender. In essence the complaint asserted an ordinary malpractice claim, which would be equally maintainable against a retained attorney or appointed counsel. The dissent also argued that public defenders should be entitled to absolute immunity from suit.

We granted certiorari to resolve the division among the Courts of Appeals over whether a public defender acts under color of state law when providing representation to an indigent client.[4] We now reverse.

II

In *United States v. Classic*, 313 U. S. 299, 326 (1941), this Court held that a person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[5] In this case the Offender Advocate for Polk County assigned Martha Shepard to represent Russell Dodson in the appeal of his criminal conviction. This assignment entailed functions and obligations in no way dependent on state authority.

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4. The Courts of Appeals for the Seventh and Eighth Circuits have held that public defenders do act under color of state law in their representation of indigent defendants. See *Robinson v. Bergstrom*, 579 F. 2d 401, 405-408 (CA7 1978) (public defender acts under color of state law but is absolutely immune from suit under § 1983); *Dodson v. Polk County*, 628 F. 2d 1104 (CA8 1980). The Fifth and the Tenth Circuits have held that they do not. See *Slavin v. Curry*, 574 F. 2d 1256, 1265 (CA5), modified on other grounds, 583 F. 2d 779 (CA5 1978); *Espinoza v. Rogers*, 470 F. 2d 1174, 1175 (CA10 1972). The Third and Ninth Circuits have supported the latter position in dicta, in cases in which they have held that public defenders are entitled to absolute immunity from suit under § 1983. See *Brown v. Joseph*, 463 F. 2d 1046, 1048 (CA3 1972), cert. denied, 412 U. S. 950 (1973); *Miller v. Barilla*, 549 F. 2d 648, 650 (CA9 1977).

The petition for certiorari in this case also presented an immunity question. The petitioners asked us to decide whether public defenders are entitled to the same absolute immunity as judges, see *Bradley v. Fisher*, 13 Wall. 335 (1872), and prosecutors, see *Imbler v. Pachtman*, 424 U. S. 409 (1976). As we hold that a public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant, we need not reach the immunity issue.

5. The Court has reiterated this definition in subsequent cases. See, *e. g.*, *Screws v. United States*, 325 U. S. 91 (1945); *Monroe v. Pape*, 365 U. S. 167 (1961).

From the moment of her appointment, Shepard became Dodson's lawyer, and Dodson became Shepard's client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client. "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." American Bar Association Standards for Criminal Justice, 4-3.9 (2d ed. 1980).[6]

Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are "officers of the court." But the courts of appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983.[7] In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the "the undivided in-

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6. See Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 Am. Crim. Q. 2, 6 (1969). This view of the public defender's obligations to his client has been accepted by virtually every court that has considered the issue. See, *e. g., Espinoza v. Rogers*, *supra*, 470 F. 2d, at 1175; *Brown v. Joseph*, *supra*, 463 F. 2d, at 1048.

7. See, *e. g., Skolnick v. Martin*, 317 F. 2d 855 (CA7 1963); *Dotlich v. Kane*, 497 F. 2d 390 (CA8 1974). This is true even of cases in which a private attorney has been assigned to represent an indigent defendant. See, *e. g., Page v. Sharpe*, 487 F. 2d 567, 570 (CA1 1973); *Hall v. Quillen*, 631 F. 2d 1154, 1156 (CA4 1980); *Mulligan v. Schlacter*, 389 F. 2d 231, 233 (CA6 1968); *French v. Corrigan*, 432 F. 2d 1211, 1214 (CA7 1970), cert. denied, 401 U. S. 915 (1971); *Barnes v. Dorsey*, 480 F. 2d 1057, 1061 (CA8 1973).

terests of his client."[8] This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.[9]

III

The respondent argues that a public defender's employment relationship with the State, rather than his function, should determine whether he acts under color of state law. We take a different view.

A

In arguing that the employment relationship establishes that the public defender acts under color of state law, Dodson relies heavily on two cases in which this Court assumed that physicians, whose relationships with their patients have not traditionally depended on state authority, could be held liable under § 1983. See *O'Connor v. Donaldson*, 422 U. S. 563 (1975); *Estelle v. Gamble*, 429 U. S. 97 (1976). These cases, he argues, are analytically identical to this one. Like the physicians in *O'Connor* and *Estelle*, a public defender is paid by the State. Further, like the institutionalized patients in those cases, an indigent convict is unable to choose the professional who will render

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8. *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979):
"[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

9. Although lawyers are generally licensed by the States, "they are not officials of the government by virtue of being lawyers." *In re Griffiths*, 413 U. S. 717, 729 (1973).

him traditionally private services. These factors, it is argued, establish that public defenders—like physicians in state hospitals—act under color of state law and are amenable to suit under § 1983.

In our view *O'Connor* and *Estelle* are distinguishable from this case. *O'Connor* involved claims against a psychiatrist who served as the superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients. On the contrary, it is his function to protect the interest of the public as well as that of his wards. Similarly, *Estelle* involved a physician who was the medical director of the Texas Department of Corrections and also the chief medical officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity.

Because of their custodial and supervisory functions, the State-employed doctors in *O'Connor* and *Estelle* faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the State through the institution, attempts to achieve. With the public defender it is different. As argued in the dissenting opinion in the Court of Appeals, it is the function of the public defender to enter "not guilty" pleas, move to suppress state's evidence, object to evidence at trial, cross examine state's witnesses, and make closing arguments in behalf of defendants.[16] All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.

16 See *Dodson v. Polk County*, 628 F. 2d, at 1110.

B

Despite the public defender's obligation to represent this clients against the State, Dodson argues—and the Court of Appeals concluded—that the status of the public defender differs materially from that of other defense lawyers. Because public defenders are paid by the State, it is argued that they are subject to supervision by persons with interests unrelated to those of indigent clients. Although the employment relationship is certainly a relevant factor, we find it insufficient to establish that a public defender acts under color of state law within the meaning of § 1983.

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *United States v. Moore*, 432 F. 2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B), ABA Code of Professional Responsibility (1977 ed.).[11]

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11. This rule has been adopted verbatim as DR 5-107(B), Iowa Code of Professional Responsibility for Lawyers, printed in Iowa Rules of Court 473, 526 (1981). The rule is "mandatory

(Continued on following page)

Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.[12] This Court's decision in *Gideon v. Wainwright*, 372 U. S. 335 (1963), established the right of State criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." *Id.*, at 345, *quoting Powell v. Alabama*, 287 U. S. 45, 69 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of State control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, *e. g.*, *Gideon v. Wainwright*, *supra*; *Holloway v. Arkansas*, 435 U. S. 475 (1978). At least in

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Footnote continued—

in character," and a lawyer who violated it would be "subject to disciplinary action" by the Iowa courts. *Id.*, at 477. See *Sanchez v. Murphy*, 385 F. Supp. 1362, 1365 (D Nev 1974) ("The personal attorney-client relationship established between a deputy [public defender] and a defendant is not one that the public defender can control. The canons of professional ethics require that the deputy be 'his own man' irrespective of advice or pressures from others. A deputy public defender cannot in any realistic sense, in fulfillment of his professional responsibilities, be a servant of the public defender. He is, himself, an independent officer.").

12. Relying on such cases as *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961) and *Moose Lodge v. Irvis*, 407 U. S. 163 (1972), the respondent claims that the State's funding of criminal defenses makes it a "joint participant" in that enterprise, locked in a "symbiotic relationship" with individual public defenders. He urges us to hold on this theory that public defenders act under color of state law within the meaning of § 1983. We cannot do so. In both *Burton* and *Moose Lodge* the question was whether "state action" was present. In this case the question is whether a public defender—who is concededly an employee of the county—acted "under color of state law" in her representation of Russell Dodson. Although this Court has sometimes treated the questions as if they were identical, see *United States v. Price*, 383 U. S. 794 and n. 7 (1966), we need not consider their relationship in order to decide this case. Our factual inquiry into the professional obligations and functions of a public defender persuades us that Shepard was not a "joint participant" with the State and that, when representing respondent, she was not acting under color of state law.

the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon v. Wainwright*, has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests.[13]

C

The respondent urges a different view of the public defender's relationship to his clients and to the State. Whatever their ethical obligations, public defenders do not, he argues, characteristically extend their clients the same undivided loyalty tendered by privately retained attorneys. In support of this argument Dodson notes that the public defender moved to be dismissed from his case against the client's wishes. Dodson claims to have suffered prejudice from this act. He insists that it would not have been taken by a privately retained attorney.

Dodson's argument assumes that a private lawyer would have borne no professional obligation to refuse to prosecute a frivolous appeal. This is error. In claiming that a public defender is peculiarly subject to divided loyalties, Dodson confuses a lawyer's ethical obligations to the judicial system with an allegiance to the adversary interests of the State in a criminal prosecution. Although a defense attorney has a duty to advance all colorable

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13. The dissenting opinion, *post*, at 1, describes the public defender as "a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation". The dissent reasons from this description that, for purposes of determining the "under color of state law" question, the function performed by the public defender is immaterial. There is no difference in this respect, the dissent contends, between administrative functions, see *Branti v. Finkel*, 445 U. S. 507 (1980), and a lawyer's traditional functions as counsel to a defendant in a criminal proceedings. This view ignores the basic distinction that in the latter capacity a public defender is not acting on behalf of the State; he is the State's adversary.

claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals.[14] Dodson has no legitimate complaint that his lawyer refused to do so.

As a matter of empirical fact, it may or may not be true that the professional obligation to withdraw from frivolous appeals will be invoked with disproportionate frequency in cases involving indigent prisoners. The recent burgeoning of post-conviction remedies has undoubtedly subjected the legal system to unprecedented strains, including increased demands for legal assistance.[15] The State of Iowa has responded by authorizing the provision of greater representation than the Constitution requires. Its system of public defenders contemplates the extension of legal assistance through the various tiers of post-conviction review, incorporating only the general ethical limitation that counsel should withdraw from frivolous cases.[16]

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14. See ABA Standards for Criminal Justice, Commentary to 4—3.9 (2d ed. 1980) ("No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained or paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer's informed professional judgment. On the contrary, to do so is unprofessional conduct."); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion 955, Obligation to Take Criminal Appeal, reprinted in Informal Ethics Opinions II, at 955-956 (1975) (like court-appointed lawyer, private counsel "ethically, should not clog the courts with frivolous motions or appeals"). See also *Nickols v. Gagnon*, 454 F. 2d 467, 472 (CA7 1971).

15. See ABA Standards for Criminal Justice, Commentary to 4—3.9 (2d ed. 1980) (noting that lawyers assigned to indigent prisoners are often put under pressure to "engage in dilatory or frivolous tactics").

16. See Iowa Code Ch. 336A. A public defender appointed pursuant to the state statute is directed to "prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice." Iowa Code § 336 A.6.

In this context Dodson argues that public defenders making withdrawal decisions are viewed by indigent prisoners as hostile state actors. We think there is little justification for this view, if indeed it is widely held.[17]

IV

In concluding that Shepard did not act under color of state law in exercising her independent professional judgment in a criminal proceeding, we do not suggest that a public defender never acts in that role. In *Branti v. Finkel*, 445 U. S. 507 (1980), for example, we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be—although the question is not present in this case—that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions. Cf. *Imbler v. Pachtman*, 424 U. S. 409, 430-431 and n. 33 (1976). And of course we intimate no views as to a public defender's liability for malpractice in an appropriate case under state tort law. See *Ferri v. Ackerman*, 444 U. S. 193, 198 (1979).[18] With respect to Dodson's § 1983 claims against Shepard, we decide only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant

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17. The view is unfortunate. Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client. But confidence will not be improved by creating a disincentive for the States to provide post-conviction assistance to indigent prisoners. To impose § 1983 liability for a lawyer's performance of traditional functions as counsel to a criminal defendant would have precisely that effect.

18. In addition to possible relief under state tort law, an indigent prisoner retains the right to initiate state and federal habeas corpus proceedings. For an innocent prisoner wrongly incarcerated as the result of ineffective or malicious counsel, this normally is the most important form of judicial relief.

in a criminal proceeding.[19] Because it was based on such activities, the complaint against Shepard must be dismissed.

V

In his complaint in the District Court, Dodson also asserted § 1983 claims against the Offender Advocate, Polk County, and the Polk County Board of Supervisors. Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. Department of Social Services*, 436 U. S. 658, 694 (1978). To the extent that Dodson's claims rest on this basis, they fail to present a federal claim.

The Court of Appeals apparently read Dodson's *pro se* complaint as susceptible of another construction. It found an actionable claim in the bald allegation that Shepard had injured him while acting pursuant to administrative "rules and procedures for . . . handling criminal appeals" and that her employers were therefore responsible for her actions. *Dodson v. Polk County*, 628 F. 2d 1104, 1108 (CA8 1980). We also have noted an allegation in respondent's complaint that the County "retains and maintains, advocates out of law school" who have on numerous occasions moved to withdraw from appeals of criminal convictions.

The question is whether either allegation describes a constitutional tort actionable under § 1983. We conclude not. In *Monell v. Department of Social Services, supra*, we held that official policy must be "the moving force of the constitutional violation" in order to establish the

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19. We do not disturb the theory of cases, brought under 18 U. S. C. § 242, in which public defenders have been prosecuted for extorting payment from clients' friends or relatives "under color of . . . law. . . ." See, *e. g., United States v. Senak*, 477 F. 2d 304 (CA7), cert. denied, 414 U. S. 856 (1973).

liability of a government body under § 1983. *Id.*, at 694. See *Rizzo v. Goode*, 423 U. S. 362, 370-377 (1976) (general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983). In this case the respondent failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments. He did assert that assistant public defenders refused to prosecute certain appeals on grounds of their frivolity. But a policy of withdrawal from frivolous cases would not violate the Constitution. *Anders v. California*, 386 U. S. 738 (1967). And respondent argued the existence of no impermissible policy pursuant to which the withdrawals might have occurred. Respondent further asserted that he personally was deprived of a Sixth Amendment right to effective counsel. Again, however, he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure.

When Dodson's complaint is viewed against the standards of our cases, even in light of the sympathetic pleading requirements applicable to *pro se* petitioners see *Haines v. Kerner*, 404 U. S. 519 (1972) (*per curiam*), we do not believe he has alleged unconstitutional action by the Offender Advocate, Polk County, or the Polk County Board of Supervisors. Accordingly, his claims against them must be dismissed.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is,

Reversed.

CHIEF JUSTICE BURGER concurring:

I join the Court's opinion, but it is important to emphasize that in providing counsel for an accused the governmental participation is very limited. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Argersinger v. Hamlin*, 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owe an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out. The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived. Disciplinary Rule 5-107(B) of the ABA Code of Professional Responsibility* succinctly states the rule:

> (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

See, e. g., ABA Code Of Professional Responsibility, Canon 5 (1976): "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-1 explains this Canon:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

See also ABA Standards For Criminal Justice, *The Prosecution Function* Ch 3, *The Defense Function* Ch 4 (2d ed. 1980).

Moreover, it is elementary that every advocate has an obligation to eschew proceedings considered to be professionally improper or irresponsible. Once counsel in this case reached a considered judgment on the merits of the claim sought to be put forward, her actions were consistent with the highest traditions of the Bar.

JUSTICE BLACKMUN, dissenting.

One perhaps should be particularly circumspect when he finds himself in solitary dissent. See *Commissioner v. "Americans United" Inc.*, 416 U. S. 752, 763 (1974) (dissenting opinion). On careful reflection, however, I am convinced that my position is a valid one, and I therefore set forth my views in opposition to those of the Court.

When a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation, violates a person's constitutional rights, the Court consistently has held that the employee acts "under color of" state law, within the meaning and reach of 42 U. S. C. § 1983. Because I conclude that the Court's decision in this case is contrary to its prior rulings on the meaning of "under color of" state law, and because the Court charts new territory by adopting a functional test in determining liability under the statute, I respectfully dissent.

I

The Court holds for the first time today that government official's "employment relationship" is no more than a "relevant factor" in determining whether he acts under color of state law within the meaning of § 1983. *Ante*, at 8. Only last Term, in *Parratt v. Taylor*, ... U. S. ... (1981),

the Court noted that defendant-prison officials unquestionably satisfied the under color of state law requirement because they "were, after all, state employees in positions of considerable authority." *Id.*, at ..... (slip op. 8). Thus began, and ended, the Court's discussion of the color of law question in that case. As in *Taylor*, the county employee sued in this action presumptively acts under color of state law. See also *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149, 157 n. 5 (1978).

The definition of "under color of" state law relied upon by the Court here and articulated in *United States v. Classic*, 313 U. S. 299 (1941), requires that the defendants in a § 1983 action have committed the challenged acts "in the course of their performance of duties" and have misused power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *Id.*, at 325-326. See also *Screws v. United States*, 325 U. S. 91, 110 (1945) (plurality opinion).

Respondent's allegations place this case squarely within both components of that definition. Respondent challenges action taken by petitioner Shepard, a full-time county employee, while acting in her official capacity and while exercising her responsibilities pursuant to Iowa law. See generally Iowa Code §§ 336A.3.2, 336A.6 (1977). The Court implicitly concedes that the Offender Advocate's assignment of Shepard to handle respondent's appeal was action under color of law. But the Court then fails to recognize that it was by virtue of that assignment that Shepard had the authority to represent respondent and to seek permission to withdraw as his counsel, thereby allegedly violating his constitutional rights. The authority of a privately-retained attorney to represent his clients is derived from the client's selection of the lawyer. A public

defender's power, however, is possessed by virtue of the State's selection of the attorney and his official employment.

The Court insists that public defenders, unlike other state employees, are free from state control because they are not subject to administrative direction—both because ethical standards require that their professional judgment not be sacrificed to the interests of their employers and because the State is obligated to provide indigent defendants with independent advocates.[1] This distinction ignores both precedent and reality. The Court long has held that a state official acts under color of law when the State does not authorize, or even know of, his conduct. See, *e. g., Adickes v. S.H. Kress & Co.*, 398 U. S. 144, 152 (1970); *Monroe v. Pape*, 365 U. S. 167 (1961). That the State did not instruct Shepard to withdraw from respondent's case is therefore irrelevant to the question whether she acted under color of state law in so doing.

Moreover, the present case is indistinguishable from *Estelle v. Gamble*, 429 U. S. 97 (1976). There the Court held that a prison doctor's deliberate indifference to a pris-

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1. The Court also says that a public defender's ethical duties and obligations are the same as those of a privately-retained lawyer and concludes that the public defender serves "essentially a private function . . . for which state office and authority are not needed." *Ante*, at 6. The fact that a state official's role is parallel to one in the private sector, however, has never before deterred the Court from holding that the former is action under color of state law. Section 1983 is meant to proscribe certain actions by state officials even though identical conduct by private persons is not included within the statute's scope. *Cf. Estelle v. Gamble*, 429 U. S. 97 (1976); see also *Griffin v. Maryland*, 378 U. S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . ."). Although *Griffin* involved "state action" under the Fourteenth Amendment, state action and under color of state law have consistently been treated as incorporating identical requirements. See n. 5, *infra*.

oner's medical needs is prohibited by the Eighth Amendment and may be the subject of a § 1983 claim. The prisoner's § 1983 complaint in *Gamble* stated claims against Dr. Gray in his capacity both as medical director for the Texas Department of Corrections *and* as treating physician. Gray was sued because he allegedly had given the plaintiff substandard medical care—the doctor's duty to the public and his custodial and supervisory functions were not at issue.[2] If the Court had determined that Gray acted under color of state law only in his capacity as a custodian and administrator, it would have dismissed the claims against him for want of subject matter jurisdiction, rather than on the merits.

The Court today holds that a public defender cannot act under color of state law because of his independent ethical obligations to his client. Yet *Gamble* cannot be distinguished on this ground. An individual physician has a professional and ethical obligation to his patient just as an attorney has to his client. Like a public defender, an institutional doctor's responsibilities to a patient may conflict with institutional policies and practices. Moreover, Dr. Gray was fulfilling the State's duty to supply medical care to prison inmates; similarly, the public defender is dedicated to satisfying the State's obligation to provide representation to indigent defendants. Finally, like respondent, who had no say in the selection of Shepard as his attorney, inmate Gamble had no role in the choice of Gray as his doctor. The *Gamble* Court did not find that color of state law evaporated in the face of a professional's independent ethical obligations. I cannot see why this case is different.

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2 Similarly, in *O'Connor v. Donaldson*, 422 U. S. 563 (1975), the defendant, a psychiatrist and superintendent of a state mental hospital, was not sued for actions taken pursuant to his responsibilities to protect the public; the evidence clearly showed that the plaintiff was hospitalized for reasons other than dangerousness to himself and others. See *id.*, at 567-568, 574, n. 9.

As is demonstrated by the pervasive involvement of the county in the operations of the Offender Advocate's office, the Court, in my view, unduly minimizes the influence that the government actually has over the public defender. The public defender is not merely paid by the county; he is totally dependent financially on the County Board of Supervisors, which fixes the compensation for the public defender and his staff and provides the office with equipment and supplies. See Iowa Code §§ 336A.5, 336A.9 (1977 and Supp. 1981).

The Board likewise is statutorily empowered to determine "indigency" and to prescribe the number of assistant attorneys and other staff members considered necessary for the public defender. See §§ 336A.4, 336A.5. The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately-retained attorneys. See, *e. g.*, *Robinson v. Bergstrom*, 579 F. 2d 401, 402-403 (CA7 1978) (public defender delayed five and one-half years in filing appellate brief because of "an error in his judgment regarding his caseload," which was 600 to 900 cases per year). Similarly, authority over the appointment of the public defender and his staff, see Iowa Code §§ 336A.3, 336A.5 (1977), gives the State substantial influence over the quality of the representation indigents receive.

In addition, the public defender is directed to file an annual report with the judges of the district court of any county he serves, the State's Attorney General, and each

county's Board of Supervisors, setting forth in detail all cases handled by the defender's office during the preceding year. § 336A.8. This requirement suggests that the government has some supervisory control over the public defender's office, or at least that the public defender will be wary of antagonizing the officials to whom he must report, and to whom he owes his appointment and the very existence of the office. See §§ 336A.3, 336A.1. And surely the public defender's staff must conform to whatever policies and regulations the office or the State imposes, including those aimed at ensuring the effectiveness of representation. In this case, for example, while the county may not have directed petitioner Shepard to withdraw from respondent's case,[3] it certainly could have established general guidelines describing the factors a public defender should consider in determining which appeals are frivolous and the proper treatment of such appeals.[4]

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3. Reasoning that § 1983 claims may not be based on the doctrine of *respondeat superior*, the Court concludes that respondent has not stated a claim against the Offender Advocate, Polk County, or the County Board of Supervisors. See *ante*, at 13-14. I agree with the Court of Appeals, however, that respondent did allege that these defendants had "established and layed [*sic*] out the ground rules" for the public defender's office and had "authorize[d] [petitioner Shepard] to act in the manner prescribed in [the] complaint. . . ." App. 5. Respondent also alleged that other public defenders in the Offender Advocate's office had acted in the same manner as had Shepard, and he challenged the "process" by which the office represented indigents. *Id.*, at 13. Although respondent did not point to any particular official policy pursuant to which Shepard had acted in withdrawing from his case, his general allegations of the existence of such a policy, "however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence." *Haines v. Kerner*, 404 U. S. 519, 520 (1972). If respondent is unable to substantiate his claims, the complaint, of course, may be dismissed on a motion for summary judgment.

4. This pervasive state control over public defenders distinguishes them from court-appointed attorneys, who are not state officials, who have control over their own caseloads and representations, who depend on the State only for a fee, and with whom the State has no real day-to-day involvement.

On the basis of the Court's opinion in *Estelle v. Gamble, supra,* and the county's pervasive involvement with the Offender Advocate's office in this case, I necessarily conclude that the presumption that a state employee acts under color of state law when exercising his official duties is not overridden by the public defender's ethical obligations to his client.[5]

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5. Although I find the Court's precedents on the definition of "under color of" state law persuasive here, I also draw support from the Court's discussions of state action under the Fourteenth Amendment. I find no basis for the Court's intimation, *ante,* at 9, n. 12, that the two doctrines incorporate different requirements. See *United States v. Price,* 383 U. S. 787, 794 n. 7 (1966). To the extent that the Court has analyzed the two concepts separately, it has done so in § 1983 suits against private actors. In *Flagg Bros., Inc. v. Brooks,* 436 U. S. 149, 157, n. 5 (1978), the Court observed: "Of course, where the defendant is a public official, the two elements of a § 1983 action merge. 'The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the [officer] were officially authorized, or lawful.' *Adickes v. S.H. Kress & Co.,* 398 U. S. 144, 152 (1970) (citations omitted)." (Ellipses in original.)

The principles articulated in *Burton v. Wilmington Parking Authority,* 365 U. S. 715 (1961), for discerning state action in the conduct of a private party are therefore helpful by way of analogy. First, the public defender's office "constitute[s] a physically and financially integral and, indeed, indispensable part of the State's plan," *id.,* at 723-724, to fulfill its constitutional obligation to provide representation to indigents. Second, the relationship between the State and the public defender is a symbiotic one: the State is able to satisfy its responsibility to supply counsel to defendants, and the public defender is gainfully employed. Finally, the State is responsible for the public defender's office and can attempt to ensure that clients receive effective assistance of counsel, for example, by hiring qualified personnel, providing sufficient funding, and enforcing strict standards of competence. In cases of ineffective assistance by public defenders, then, it may be said that the State "has not only made itself a party to the [representation], but has elected to place its power, property and prestige behind [the public defender's action]. The State has so far insinuated itself into a position of interdependence with [the attorney] that it must be recognized as a joint participant in the challenged activity . . . ." *Id.,* at 725.

II

Although holding that petitioner Shepard may not be held liable under § 1983 for withdrawing from respondent's appeal, the Court limits its ruling to cases where the public defender performs "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Ante*, at 13. The Court appears to concede that a public defender may act under color of state law when performing unspecified administrative and investigative functions, or even when acting as an advocate—if his conduct is "nontraditional," or if the plaintiff pleads and proves that the State influenced the attorney's representation. See *ante*, at 12, 13 and n. 19, 10. These attempts to draw distinctions based on function are unconvincing.

The Court never before has held that a government employee acts under color of state law while performing some of his official duties but not while performing others. The Court drew no such distinctions in *Estelle v. Gamble*, *supra*, although it could have adopted the Court's approach today and held that an institutional physician acts under color of state law when acting in his custodial and administrative roles, but not when treating a patient. I can only conclude that the Court creates this artificial distinction in order to avoid a conflict with *Branti v. Finkel*, 445 U. S. 507 (1980), where the Court did not pause to question whether the defendant-public defender acted under color of state law.

Imbler v. Pachtman, 424 U. S. 409 (1976), cited by the Court, *ante*, at 12, does not support such line-drawing. Based on policy considerations that are inapplicable here, see n. 8, *infra*, the Court held in *Imbler* that the prosecutor enjoys absolute immunity for actions taken in his role

as an advocate. The Court refused to decide, however, whether the same policies require immunity for prosecutors acting in their administrative or investigative roles. Not only did the *Imbler* Court therefore fail to endorse the functional test adopted here, but it pointed to the difficulties it foresaw in implementing such a test. See 424 U. S., at 431 n. 33.

Moreover, the question of immunity—what type of affirmative defense is to be afforded a state official sued under § 1983—is completely different from the issue whether an employee acts under color of state law—a determination that goes to a federal court's subject matter jurisdiction over a complaint. If a defendant does not act under color of state law, a federal court has no power to entertain a § 1983 complaint against him. The immunity doctrine, which is based on common-law traditions and policy considerations, is a defense that must be pleaded and is not relevant to a court's power to consider the case. Even officials protected by absolute immunity act under color of state law, and *Imbler* did not indicate to the contrary; in fact, absolute immunity protects a prosecutor from § 1983 liability only as long as his actions are within the scope of the immunity. See *Imbler*, 424 U. S., at 419 n. 13. The Court nowhere suggested in *Imbler* that the functional test could properly be used in any other context.

The Court also disclaims any intent to disturb cases in which public defenders have been prosecuted under the criminal counterpart of § 1983, 18 U. S. C. § 242, for extorting payment from clients' friends or relatives, *ante*, at 13 n. 19, citing *United States v. Senak*, 477 F. 2d 304 (CA7), cert. denied, 414 U. S. 856 (1973), apparently because the Court does not consider such conduct a "tradi-

tional" function of an attorney.[6] Yet the Court of Appeals' holding in *Senak* that the attorney acted under color of law is inconsistent with the Court's line-drawing here.[7] As the final loophole, the Court apparently leaves open the possibility that an indigent defendant could plead and prove that the State so influenced the public defender assigned to his case as to make him liable under § 1983. See *ante*, at 10. What type of state intervention is sufficient, and how a plaintiff is supposed to allege such facts before discovery, are not specified.

In essence, the Court appears to be holding a public defender exempt from § 1983 liability only when the alleged injury is ineffective assistance of counsel. Not only is it disturbing to see the Court adopt a hierarchy of constitutional rights for purposes of § 1983 actions, but such an approach will be extremely difficult to implement. I envision the Court's functional analysis as having one of two results—both, in my view, unfortunate. If the federal courts in effect adopt a *per se* rule and dismiss

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6. Again, the Court's hand is forced somewhat by precedent—even those officials afforded absolute immunity from civil damages under § 1983 are susceptible to prosecution under § 242 for the willful violation of civil rights. See *Imbler v. Pachtman*, 424 U. S. 409, 429 (1976). The Court has consistently held that the two provisions incorporate the same under color of state law requirement. See, *e. g.*, *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 152, n. 7 (1970); *United States v. Price*, 383 U. S. 787, 794, n. 7 (1966).

7. In *Senak* the Court of Appeals held that a public defender's demand for compensation from a client was made "ostensibly by virtue of [the attorney's] appointment 'backed by the power of the state,'" and that his official position "gave him the opportunity to make the demands and clothed him with the authority of the state in so doing." 477 F.2d, at 308. Similarly, in this case, petitioner Shepard's authority to withdraw from respondent's case was derived from her "appointment 'backed by the power of the state'", her official position "gave her the opportunity" to act so as allegedly to violate respondent's constitutional rights.

all § 1983 complaints against public defenders, the most egregious behavior by a public defender, even if unquestionably the result of pressures by the State, will not be cognizable under § 1983. Alternatively, the courts may attempt diligently to implement the Court's ruling and dismiss only those § 1983 claims based on the public defender's "traditional" functions as an advocate. The outcome then, I fear, will be lengthy and involved hearings on the merits to determine whether the court has subject matter jurisdiction—the very result the Court wishes to avoid.

III

I am sympathetic with the Court's desire to protect public defenders, who represent indigent defendants in good faith, from a § 1983 suit by every dissatisfied client. But the Court's concern for public defender programs—and its seeming hostility to the merits of respondent's claims, see *ante*, at 10-12 and n. 17—do not justify the approach taken by the Court today. To recognize that public defenders act under color of state law would not transform every legal malpractice into a constitutional violation. Cf. *Estelle v. Gamble*, 429 U. S. 97, 105-106 (1976). Presumably, some immunity would be provided public defenders sued under § 1983.* The Court always

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8. I do not discuss this issue in detail because the Court does not reach it, but I assume that public defenders should be afforded qualified immunity. Absolute immunity has been extended only to those in positions that have a common-law history of immunity. See, *e. g.*, *Pierson v. Ray*, 386 U. S. 547, 554-555 (1967). Moreover, public defenders' jobs do not subject them to conflicting responsibilities to a number of constituencies so that absolute immunity is necessary to ensure principled decision-making; in fact, the threat of § 1983 claims by dissatisfied clients may provide additional incentive for competent performance of a public defender's duties. See *Ferri v. Ackerman*, 444 U. S. 193, 203-204 (1979).

has seen fit before to rely on immunity and the procedures available for dismissing meritless complaints in order to protect state officials. See, *e. g., Butz v. Economou,* 438 U. S. 478, 507-508 (1978); cf. *Ferri v. Ackerman,* 444 U. S. 193, 200 n. 17 (1979). I would do the same here.

I would affirm the judgment of the Court of Appeals.

NORMAN G. JESSE, Assistant Polk County Attorney, Des Moines, Iowa (DAN L. JOHNSTON, Polk County Attorney and THOMAS M. WERNER, Assistant Polk County Attorney with him on the brief) for petitioners; JOHN D. HUDSON, Des Moines, Iowa on the brief for respondent; EDWIN S. KNEEDLER, Office of the Solicitor General (LAWRENCE G. WALLACE, Acting Solicitor General, JAMES P. TURNER, Acting Assistant Attorney General, ELINOR HADLEY STILLMAN, Assistant to the Solicitor General, WALTER W. BARNETT and LOUISE A. LERNER, Justice Department attorneys, with him on the brief) for U.S., as amicus curiae.

(Filed October 28, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT
MIAMI DIVISION

CASE NO. 80-2924

COMPLAINT ..... CLASS ACTION

G. A., a minor, on his own behalf and by R. A., his mother and next of friend on behalf of her son and all others similarly situated,
Plaintiffs,

vs.

PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, AND ARMANDO MERINO, individually and in their official capacities,
Defendants.

DECLARATORY AND INJUNCTIVE RELIEF REQUESTED

I. PRELIMINARY STATEMENT

1. This is a class action for declaratory, injunctive, and other equitable relief on behalf of Plaintiff, G.A., a minor, by and through his mother and next of friend, R.A., and on behalf of all children who have been, are currently, or in the future will be confined in the Adolescent Unit, Jackson Memorial Hospital, Psychiatric Institute, Miami, Florida (hereinafter referred to as the Adolescent Unit) to seek redress of rights secured by the Constitution of the United States and by the laws and the Constitution of the State of Florida.

2. The Adolescent Unit exists to offer in-patient psychiatric treatment to moderately and severely disturbed non-retarded adolescents. Defendants subject adolescents admitted to the Adolescent Unit to a unique and peculiar "treatment" program. Of unproven validity, the program is an inordinately complex mixture of allegedly psychotherapeutic and behavior modification techniques. In accordance with this program and under the rubric of "treatment", Defendants impose massive restrictions on the fundamental personal liberties of Plaintiff G. A. and the class of persons he seeks to represent. These restrictions are so severe and so arbitrarily applied as to render Defendants' "treatment" for adolescents degrading, dehumanizing, abusive and detrimental.

3. Plaintiff G. A. and the class he seeks to represent challenge the constitutionality of Defendants' policy, practice, and procedure which deny fundamental personal liberties to Plaintiff G. A. and the class he seeks to represent, to wit: (a) the right to free communication and association; (b) the right to due process of the law; (c) the right to be free from cruel and unusual punishment; (d) the right to refuse treatment; (e) the right to privacy, bodily integrity, and human dignity; (f) the right to equal protection of the law; (g) the right to family integrity; and (h) the right to receive treatment in a manner least restrictive of one's personal liberties.

4. Plaintiff G. A., and members of the class he seeks to represent are subject to various degrading, dehumanizing, and abusive practices by Defendants, which practices are visited upon Plaintiff G. A. and the members of the class he seeks to represent without notice, consent or sound medical reason. These practices include, but are not limited to, the following:

a) complete incommunicado confinement;

b) forcible administration of drugs;

c) involuntarily imposed treatment, including forced medication (with numerous adverse side effects), and without express informed written consent from the patient or the patient's guardian;

d) enforced idleness—e.g., having to sit in a chair and stare at the wall for long periods;

e) being made to sleep in the hall on only a mattress and sheet;

f) being constantly locked in seclusion (solitary confinement) frequently and for long periods;

g) having communication between adolescents and their families prohibited for weeks and months;

h) being stripped of the right to wear one's own clothes and forced to wear only a hospital gown for weeks; and,

i) having access to bathroom facilities only once an hour.

5. This action seeks to ensure that the children confined in the Adolescent Unit are accorded their legal rights as mandated by Florida and Federal law which Defendants have consistently disregarded.

6. Furthermore, the citizens of this community and the State of Florida must be assured that admission of children for treatment to the Adolescent Unit of Jackson Memorial Hospital will not require that these children be subjected to the degrading, demoralizing, and dehumanizing policy, practice and procedure as alleged in this complaint nor surrender their fundamental constitutional liberties or statutory rights.

II. JURISDICTION

7. This is a suit in equity authorized by 42 U.S.C. §1983 to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed by the Constitution and laws of the United States. The rights sought to be redressed are rights guaranteed by the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, rights secured by Chapter 394, Florida Statutes (1979), and rights guaranteed by Article I, Sections 2, 4, 9, and 17 of the Florida Constitution.

8. Jurisdiction vests in this Court pursuant to 28 U.S.C. §1343(3).

9. Plaintiff and members of the class he seeks to represent invoke this Court's pendent jurisdiction to adjudicate rights guaranteed under Chapter 394, Florida Statutes, which claims arise from the same nucleus of operative fact as that which spawns the federal claims incorporated herein.

10. This Court has authority to grant injunctive and declaratory relief pursuant to 28 U.S.C. §2201-2202 and through Federal Rule of Civil Procedure (Fed.R.Civ.P.) 57 and 65.

III. PARTIES

11. Plaintiff G. A. is a 17 year old minor child held involuntarily at Jackson Memorial Hospital Psychiatric Institute. R. A. is a schoolteacher and the mother and natural guardian of Plaintiff G. A. Both G. A. and R. A. are citizens of the State of Florida and residents of Dade County, Florida.

12. Defendant PUBLIC HEALTH TRUST, INC., OF DADE COUNTY, doing business as JACKSON MEMORIAL HOSPITAL, (J.M.H.), is a county hospital orga-

nized pursuant to Chapter 155, Florida Statutes, and is a "Receiving Facility" as defined in Chapter 394, Florida Statutes.

13. Defendants THOMAS J. KELLY and JOSEPHINA PEREZ are employees of J.M.H. Defendants KELLY and PEREZ are in charge of Plaintiff G. A.'s treatment.

14. Defendant THOMAS J. KELLY is the supervisor of the Adolescent Psychiatric Unit at J.M.H.

15. Defendant JAMES SUSSEX is an employee of J.M.H. and, as Chief, Psychiatric Services of J.M.H., is responsible for the administration and supervision of psychiatric services at J.M.H.

16. Defendant ARMANDO MERINO is an employee of J.M.H. and, as Administrator, Mental Health Services, J.M.H. Psychiatric Institute, is responsible for the administration of hospital services at the J.M.H. Psychiatric Institute. Defendant MERINO is the "Administrator" of J.M.H. Psychiatric Institute as defined in Chapter 394, Florida Statutes.

IV. CLASS ACTION ALLEGATIONS

17. Plaintiff brings this action on his own behalf and on behalf of all others similarly situated pursuant to Rule 23(a) and 23(b)(1) or (2) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.).

18. The prerequisites to a class action are met:

a) The class is so numerous that joinder of all members is impractical. Plaintiff seeks to represent all children who have been, who are presently, or will in the future be confined to Jackson Memorial Hospital Adolescent Unit. The number of children now confined to Jackson Memorial Hospital Adolescent Unit is in excess of twenty (20).

b) Questions of law and fact common to the class include:

(i) Are Plaintiffs treated as alleged?

(ii) Does Defendants' treatment of Plaintiffs violate their fundamental constitutional and state statutory rights to free speech and association, to family integrity, to refuse treatment, to be free from cruel and unusual punishment, to due process of law, to equal protection of the law, and to receive treatment in a manner least restrictive of their personal liberties?

c) Plaintiff's claims are typical of the claims of the class and predominate over any claims affecting only individuals.

d) The named Plaintiff will fairly and adequately protect the interests of the class.

19. This action may be maintained as a class action pursuant to Rule 23(b)(1) Fed.R.Civ.P. because the prosecution of separate actions by individual members of the class would create a risk of:

a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendants, or

b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

20. This action may be maintained as a class action pursuant to Rule 23(b)(2) Fed.R.Civ.P. because Defendants have acted or refused to act on grounds generally

applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

V. FACTUAL ALLEGATIONS

21. On or about August 20, 1980, Plaintiff G. A. and his mother R. A., sought in-patient treatment at Jackson Memorial Hospital for Plaintiff G. A. Plaintiff G. A. was admitted to Jackson Memorial Hospital Institute 5 under the care of Sheldon Frank, M.D.

22. During the entire 29-day period that Plaintiff G. A. was treated by Dr. Frank, there were no restrictions placed on his communication with his mother, his friends or other patients. Plaintiff G. A. was free to write to, telephone or visit with his mother. R. A. likewise was free to write to, telephone or visit with her son. During this period Plaintiff G. A. was allowed to wear his own clothes and to leave the confines of his ward for recreation and exercise.

23. While Plaintiff G. A. was under Dr. Frank's care, both he and R. A., his mother and natural guardian were informed of, and consented to, the treatment recommended and prescribed by Dr. Frank.

24. On or about September 17, 1980 Plaintiff G. A. was transferred to Annex 4, Jackson Memorial Hospital's Adolescent Unit, and placed under the direct care of Defendants Kelly and Perez.

25. Jackson Memorial Hospital Annex 4, Defendants' Adolescent Unit (hereinafter Adolescent Unit), is used exclusively for the in-patient psychiatric treatment of moderately or severely disturbed non-retarded adolescents. The Adolescent Unit, under the control of Defendant Kelly, employs a unique "treatment" program which utilizes

forms of aversive conditioning and punishment to the detriment of Plaintiff G. A. and members of the class he seeks to represent.

26. Defendants, consistent with their policy, practice and procedure in effect on the Adolescent Unit immediately, without reason, notice, or reliance on discernible standards, held Plaintiff G. A. totally incommunicado for an entire week. Only after prolonged and tearful pleading by his mother R. A., did Defendant Kelly offer a token concession: R. A. would be allowed to send letters to her son, but those letters were to be opened, read and held subject to censure by hospital staff before delivery to Plaintiff G. A. Plaintiff G. A. was not then, and is not now permitted by Defendant Kelly to write to, telephone or visit with his mother or any other person. Plaintiff G. A. has been refused telephone access to his attorneys on numerous occasions; likewise, Plaintiff G. A.'s attorneys have been refused telephone communication with their client, Plaintiff G. A. Plaintiff G. A., pursuant to Defendant Kelly's "treatment" plan, has been held almost totally incommunicado since September 17, 1980.

27. Defendants, consistent with their policy, practice and procedure in effect on the Adolescent Unit immediately, without reason, notice, or reliance on discernible standards, stripped Plaintiff G. A. of the right to wear his own clothes, forced Plaintiff G. A. to wear only a hospital gown, prohibited Plaintiff G. A. from speaking, and prohibited Plaintiff G. A. from using the bathroom more than once hourly regardless of need, thereby subjecting Plaintiff G. A. to extreme discomfort and considerable emotional distress.

28. Defendants, consistent with their policy, practice and procedure in effect on the Adolescent Unit immediately without reason, notice or reliance on discernible standards,

severely restricted Plaintiff G. A.'s freedom of movement, to wit:

a) Plaintiff G. A. was not to be, and has not been, (except for periods of solitary confinement), allowed to leave the confines of the Adolescent Unit;

b) Plaintiff G. A. has been forced to sit on a chair guarded by an attendant for unduly long periods;

c) Plaintiff G. A. has been forced to sit on a chair without standing or stretching and facing only the wall for unduly long periods;

d) Plaintiff G. A. has been prohibited from using the bathroom except once hourly;

e) Plaintiff G. A. has not been allowed outdoor exercise or exposure to sunlight and fresh air; and

f) Plaintiff G. A. has been forced to remain in a seclusion room at Defendants' whim and caprice on numerous occasions and for unduly long periods as set forth more fully in paragraphs 33 and 34 below.

29. On or about September 25, 1980, Defendant Kelly ordered that Plaintiff G. A. be given large doses of Stelazine, a powerful psychotropic medication with numerous adverse side effects. Plaintiff G. A. soon became dizzy, drowsy, and unable to concentrate.

30. Shortly thereafter, on or about October 2, 1980, Defendant Kelly, in response to Plaintiff G. A.'s adverse reaction to the high doses of medication, decreased the dosage to one-fifth (1/5) the original prescription.

31. Neither Plaintiff G. A. nor his mother and natural guardian, R. A., have ever given their express written and informed consent to any treatment administered to Plaintiff G. A. from September 17, 1980 to the present.

To the contrary, R. A. has frequently and vehemently refused to consent to the treatment given to her son by Defendants from September 17, 1980 to the present, and has explicitly demanded that no more medication be forced upon Plaintiff G. A. (See Exhibit A).

32. Defendants have never sought nor received written express informed consent to treatment forced upon Plaintiff G. A. Express written demands by R. A., Plaintiff G. A.'s mother and natural guardian, that no more medication be forced upon Plaintiff G. A. have been ignored. Defendants, consistent with their policy, practice and procedure and without reason, notice or reliance on discernible standards, have continued to force medication upon Plaintiff G. A. absent a judicial finding that there existed a clear and present danger of (1) extreme violence, (2) personal injury or (3) attempted suicide and (4) that no less restrictive treatment alternative was appropriate.

33. Defendants, consistent with their policy, practice and procedure in effect at the Adolescent Unit have compelled Plaintiff G. A. to remain solitarily confined in a small seclusion room for long periods without reason, notice, or reliance on discernible standards, and absent a hearing to determine that there existed a clear and present danger of (1) extreme violence, (2) personal injury, or (3) attempted suicide and (4) that no less restrictive treatment was appropriate. Defendants have secluded Plaintiff G. A. numerous times including, but not limited to, the following occasions:

a) September 19, 1980; one hour, 9:00 a.m. to 10:00 a.m.; reason: "provoking peers, hostile behavior";

b) September 25, 1980; one hour, 4:15 p.m. to 5:15 p.m.; reason: "limit setting, breaking c/o and communication hold rule";

c) September 27, 1980; one hour; 10:45 p.m. to 11:45 p.m.; reason: "limit setting";

d) September 28, 1980; one-half hour; 2:30 p.m. to 3:00 p.m.; reason: "limit setting";

e) September 29, 1980; one and one-quarter hours; 9:15 p.m. to 10:30 p.m.; reason: "limit setting";

f) October 4, 1980; one hour; 8:15 p.m. to 9:15 p.m.; reason: "limit setting";

g) October 16, 1980; four and one-quarter hours; 10:15 a.m. to 12:00 noon, 1:00 p.m. to 3:30 p.m.; reason: "agitated, refused to follow D.C.O. rules"; and

h) October 17, 1980; one and one-quarter hours, 7:00 p.m. to 8:15 p.m.; reason: "limit setting".

34. On October 22, 1980, Defendants, consistent with their policy, practice and procedure in effect on the Adolescent Unit did, without reason, notice or reliance on discernible standards and absent a hearing to determine that there existed a clear and present danger of (1) extreme violence, (2) personal injury, or (3) attempted suicide and (4) that no less restrictive treatment was appropriate, take Plaintiff G. A. off the Adolescent Unit and place him on an adult ward in a locked, multi-chambered seclusion area alone with a psychotic adult male who speaks only Spanish. After 137 hours (almost six entire days, from 3:15 p.m. on October 22, 1980 to 8:00 a.m. on October 28, 1980) of this incarceration in semi-solitary confinement on an adult ward, Plaintiff G. A. was transferred back to the Adolescent Unit and immediately locked in solitary confinement in a small, barren room where he remains at present. Plaintiff G. A. has been subjected to Defendants' "treatment-by-solitary-confinement" for over six (6) days. While Plaintiff G. A. has been so incarcerated,

Defendants have conducted inadequate periodic medical reviews to determine the necessity for continued solitary confinement or whether other less restrictive treatment was appropriate.

35. Defendants' conduct, as described above in paragraphs 25 through 34 and incorporated herein by reference, has unnecessarily abridged Plaintiff G. A.'s personal liberties, as lesser restrictive treatment alternatives were available to Defendants in every instance.

36. Defendants' conduct complained of in paragraphs 21 through 35 above and incorporated herein by reference, is the result of policy, practice and procedure embodied in Defendants' "treatment" program in effect on, and unique to, the Adolescent Unit at J.M.H. and has been, is and will be imposed upon each and every member of the class Plaintiff G. A. seeks to represent. Defendants' policy, practice and procedure complained of above has been created exclusively for, and enforced exclusively against, only those minor children admitted to the Adolescent Unit. Minor children admitted to other wards at J.M.H. are not so summarily or systematically deprived of their personal liberties.

VI. STATEMENT OF CLAIMS

37. The factual allegations set forth in this complaint are re-alleged and incorporated herein by reference. The policy, practice and procedure alleged in the complaint violate the rights of Plaintiff G. A. and the class he seeks to represent under the Constitution and the laws of the State of Florida and the Constitution of the United States.

First Claim

38. The policy, practice and procedure relating to the arbitrary and capricious restrictions placed on visita-

tion, communication and access to telephones without reason, notice, reliance on discernible standards, and a hearing, deprive Plaintiff G. A. and the class he seeks to represent of their rights to freedom of association and expression, to be free from cruel and unusual punishment, to receive treatment in a manner least restrictive of personal liberties, to due process of law and to equal protection of law as guaranteed by the First, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 4, 9 and 17 of the Florida Constitution and *Fla. Stat.* §394.459(1), (2), (4) and (5) (1979).

Second Claim

39. The policy, practice and procedure of arbitrarily and capriciously restricting Plaintiff G. A. and the members of the class he seeks to represent from freedom of movement as alleged in the complaint violate their rights to freedom of speech and association, to be free from cruel and unusual punishment, to receive treatment in a manner least restrictive of personal liberties, and to due process and equal protection of the law as guaranteed by the First, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 4, 9 and 17 of the Florida Constitution and *Fla. Stat.* §394.459(1), (2), (4) and (5) (1979).

Third Claim

40. The policy, practice and procedure of opening, inspecting and reading personal correspondence of Plaintiff G. A. and members of the class he seeks to represent violate their rights to free speech, to equal protection of the law, to due process of law, and to receive treatment in a manner least restrictive of personal liberties as guaranteed by the First and Fourteenth Amendments to

the United States Constitution, Article I, Sections 2, 4 and 9 of the Florida Constitution and *Fla. Stat.* §394.459(1), (2), (4) and (5) (1979).

Fourth Claim

41. The policy, practice and procedure of forcing, without reason, notice, reliance on discernible standards, consideration of less restrictive alternatives and a hearing, psychotropic medication on Plaintiff G. A. and members of the class he seeks to represent violates their rights to freedom of thought, to freedom of expression, to bodily integrity, to privacy, to freedom of movement, to be free from cruel and unusual punishment, to receive treatment in a manner least restrictive of personal liberties, to due process of law, to equal protection of law, and to express informed consent to treatment as guaranteed by the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and *Fla. Stat.* §394.459(1), (2), (3) and (4) (1979).

Fifth Claim

42. The policy, practice, and procedure of arbitrarily and capriciously confining Plaintiff G. A. and members of the class he seeks to represent in seclusion (solitary confinement) without reason, notice, reliance on discernible standards, consideration of less restrictive alternatives and a hearing violates the rights of Plaintiff G. A. and the class he seeks to represent to be free from cruel and unusual punishment, to receive treatment in a manner least restrictive of personal liberties, and to due process and equal protection of the law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, and 17 of the Florida Constitution and *Fla. Stat.* §394.459(1), (2) and (4) (1979).

Sixth Claim

43. *Fla. Stat.* §394.459(5)(1979) is unconstitutional on its face and as applied in that it is vague, overbroad and fails to provide adequate notice of what conduct is prohibited before communication and visitation rights can be restricted and therefore permits the Defendants unfettered discretion to restrict communication and visitation rights in violation of the right to due process of law of Plaintiff G. A. and members of the class he seeks to represent as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

Seventh Claim

44. Defendants have totally failed to consider less restrictive alternatives prior to the implementation of the policies practices and procedures as alleged in the complaint and therefore violate the right of Plaintiff G. A. and the class he seeks to represent to receive treatment in a manner least restrictive of personal liberties as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and *Fla. Stat.* §394.459 (1), (2), (b) and (4) (1979).

VII. DEFENDANTS' CONDUCT

45. All of the acts or omissions of each of the Defendants were under color of state law and by virtue of the authority vested in each of them by the State of Florida.

46. Defendants have violated and deprived, and continue to violate and deprive, Plaintiff G. A. and the class he seeks to represent of their statutory and constitutional rights and have failed to terminate or otherwise correct such practices.

47. As a direct and proximate result of the aforementioned acts, policy, practice, and procedure and omissions of Defendants, Plaintiff G. A. and the class he seeks to represent have suffered a massive violation of their federal and state constitutional and state statutory rights.

VIII. NATURE OF RELIEF

48. As a result of Defendants' aforementioned policy, practice, procedure and omissions, the individual named Plaintiff and the members of the class he seeks to represent have suffered and will continue to suffer immediate and irreparable injury. The Plaintiff G. A. and the members of the class he seeks to represent have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff G. A. and the class he seeks to represent will continue to be irreparably injured by the conduct of the Defendants unless this Court grants the preliminary and permanent declaratory and injunctive relief sought.

IX. RELIEF REQUESTED

49. WHEREFORE, Plaintiff G. A. and the class he seeks to represent pray this Court to:

a) Assume jurisdiction;

b) Allow this action to proceed as a class action pursuant to Fed.R.Civ.P. 23(c)(1);

c) Issue judgments pursuant to 28 U.S.C. §§2201 and 2202 declaring that the policy, practice, procedure, acts and omissions alleged in the complaint are violative of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States, Article I, Sections 2, 4, 9, and 17 of the Florida Constitution and *Fla. Stat.* §§394.459 (1), (2), (3), (4) and (5) (1979);

d) Issue a preliminary injunction, and upon final hearing, a permanent mandatory injunction directing the Defendants, their agents, employees and successors in office and all persons acting in concert with them from continuing the policy, practice, and procedure or omissions alleged in the complaint and to take all remedial measures necessary to rectify the unconstitutional conditions alleged herein;

e) Require Defendants to submit to the Court within thirty (30) days after judgment is entered a plan outlining the steps to be taken by Defendants to comply with judgment of this Court;

f) Retain jurisdiction of this action until the policy, practice, procedure or omissions alleged in the complaint have ceased to exist; and

g) Grant the Plaintiffs such other additional and alternative relief as may appear equitable and just to the Court.

Respectfully Submitted,

Bennett H. Brummer
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N. W. 12th Street
Miami, Florida 33125

By: /s/ William Ploss
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By: /s/ Barry Weinstein
Barry Weinstein
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305/547-7300

82-1989

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE HONORABLE BENNETT H. BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida and BARRY WEINSTEIN AND WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,

Petitioners,

vs.

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, and ARMANDO MERINO,

Respondents.

RESPONSE OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

JIM SMITH
Attorney General

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, (820)
Miami, Florida 33128

QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT TO PROHIBIT FLORIDA PUBLIC DEFENDERS FROM FILING ANY CLASS ACTION SUITS ON BEHALF OF A CLASS OF INDIVIDUALS VIOLATES THE RIGHT TO INDEPENDENT COUNSEL AND ACCESS TO COURT GUARANTEED INDIVIDUALS BY THE SIXTH AND FOURTEENTH AMENDMENTS.

PARTIES TO THE PROCEEDINGS

Respondents accept the list of all parties appearing on Page ii of the Petition.

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PRELIMINARY STATEMENT

Respondents accept that portion of the Petition for Writ of Certiorari setting forth the opinion in the court below and Constitutional and Statutory Provisions Involved found on pages 1 and 2 through 4, of the Petition.

JURISDICTION

Respondents cannot accept Petitioner's assertion that this Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner has failed to present a substantial federal question entitling him to this Court's exercise of its jurisdiction. The Florida Supreme Court in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982) rehearing denied March 3, 1983, resolved the question of whether a Florida

Public Defender may file a class action suit adversely to petitioners on separate, adequate and independent state grounds. Specifically, the court held:

> "...The Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those who he is appointed to represented and he is not authorized by statute to undertake representation of any such additional persons. He therefore cannot undertake representation of a class.
>
> Our reasoning in the case at bar paralleled that which was used in our decision of Graham v. State, 372 So.2d 1363 (Fla. 1979). There, concluded that the State of Florida is under no obligation to provide the counsel or cost in Federal proceedings."
>
> 426 So.2d

In Michigan v. Long, __U.S.__, 103 S.Ct. 3469 (1983) the court stated:

> "...If the state court decision indicates clearly and expressly that it is alternatively based on bona

> fide separate, adequate and independant grounds, we, of course, will not undertake to review the decision."
>
> at 103 S.Ct.Rep.3476

See also Florida v. Casal, __U.S.__ 103 S.Ct.Rep. 3100 (1983).

STATEMENT OF THE CASE

Respondents do not accept the Statement of Facts as presented by Petitioners and would tender the following facts as set forth by the Supreme Court of Florida in its opinion in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982):

> "Respondents were appointed to represent a minor, G.A. in a Chap. 394 Involuntary Commitment proceeding. Although he was committed at the conclusion thereof, G.A. was later ordered released by the Dade County Circuit and has remained at liberty ever since.
>
> In addition to representing him in

the above proceedings, Respondents filed suit on behalf of G.A. and all others that were similarly situated in the United States District court alleging violations of Constitutional rights and seeking declaratory and injunctive relief. The suit was instituted by R.A., G.A.'s mother. A Motion for Class Certification was additionally filed as well as a Motion for Leave to Proceed in Forma Pauperis. The latter motion was initially granted but later, on a motion by the opposing parties, was vacated.

Subsequent to the above, G.A. and R.A. filed an amended complaint, seeking damages, in the federal proceeding. That pleading was signed by two of the respondents and by Eugene Zenobi, a private practioner not employed by the Public Defender's office. Relators then brought this quo warrranto proceeding to challenge respondent's authority to initiate the Federal proceedings in the form of a class action suit.

It is the petitioner's contention that the public defender is not authorized to bring a class action suit, particularly when there is not showing that each member of the purported class is indigent and when there is not showing that the public defender that was ever appointed to represent in any proceeding, any member of the class other than the named plaintiff.

Respondents counter by arguing that the bringing of a class action was the most efficient way to represent these individuals with the limited resources of the Office of the Public Defender."

426 So.2d at 532

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's response to the Rule to Show Cause issued pursuant to Respondents' Petition for Writ Quo Warranto set forth three grounds upon which they asserted the Quo Warranto Petition should be denied. Specifically (1) the statutory duty of the public defender to represent indigent persons in involuntary hospitalization proceedings necessarily includes authorization to maintain Federal civil litigation on collateral issues substantially related to the purpose of appointment; (2) the public defender's clients, like all other persons, enjoy a fundamental right of access under the Federal and State Constitutions to all legal remedies, without regard to whether those remedies are designated as civil; and

(3) the ethical obligations of the public defender require that he be permitted to bring civil suits on both direct and collateral issues which are substantially related to the purpose of his appointment in an involuntary hospitalization proceeding.

Digesting the aforementioned, Petitioners argued that as to the public defender's statutory duty to represent indigent persons in Federal civil litigation:

> ".. Section 27.51(1)(d) Fla.Stat. (1979) requires the public defender to represent indigents in involuntary hospitalization proceedings. Nothing in this statute limits the representational authority of the public defender. It is axiomatic that the establishment of the duty to represent necessarily carries with it the inherent power to initiate and engage in all litigation necessary to the complete exercise of this mandate which does not conflict with another law or public policy."

Next, Petitioners asserted that the public defender's clients are entitled to a fundamental right of access under the federal and state constitutions and that:

> "...Civil rights action instituted on behalf of G.A. is no different from the federal and state civil litigation regularly engaged in by the public defender on behalf of ingents subjected to criminal prosecutions. This court's decision in Schulman v. State, supra, requires that the instant case be treated identically."

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Finally, the Petitioners argue that their ethical obligation to represent indigent clients or clients involved in involuntary hospitalization proceedings "enjoy the same attorney/client relationship and incurs the same ethical obligation, as his counterpart in private practice. Citing to Ferri v. Ackerman, 444 U.S. 192 (1979) Petitioners argue that a person

represented by a public defender deserves no less representation than an individual represented by privately retained counsel. A35-36.

The Florida Supreme Court in State ex rel. Smith v. Brummer, supra, in reviewing each of the aforementioned theories concluded that while the state was constitutionally obligated to respect the professional independence of public defenders whom it engages, the Public Defender's Office in Florida must have authority to act. Whereas here Florida Statutes do not provide authority for a public defender to initiate class action where the class has not even defined, "...The State of Florida is under no obligation to provide the counselor cost in Federal proceedings." 426 So.2d at 533. The Florida Supreme Court

further noted that the decision in State ex rel. Smith v. Brummer did not limit the public defender's ability to represent and seek Federal relief for a client on an individual basis.

> "A lawyer's professional responsibility may dictate this action. It is, however, our view that a state court could not mandate this action."
>
> 426 So.2d at 533.

It is apparent from the opinion rendered in State ex rel. Smith v. Brummer, supra, that though couched in constitutional niceties, the Federal Question presented herein was not decided as a Federal issue but rather was decided on State law.

REASONS THE WRIT SHOULD NOT BE GRANTED

Respondents would assert that this Court's recent decision in Michigan v. Long, __U.S.__ 103 S.Ct. 3469 (1983) eliminates any need for further review of the instant petition. The Florida Supreme Court in State ex rel. Smith v. Brummer, 426 So.2d at 533 in granting the State's Petition for Writ of Quo Warranto held:

> "Our reasoning in the case at bar paralleled that which was used in our decision of Graham v. State, 372 So.2d 1363 (Fla. 1979). There, we concluded that the State of Florida is under no obligation to provide the counsel or costs in Federal proceedings.
>
> The decision to file this Federal complaint as a class action suit is said to be a tactical move on the part of the respondent. Respondents have based their decision on the likely of obtaining relief for both G.A. and other individuals. The mere fact that a decision is tactical is

of no import. Invariably, the Respondents must still have the authority to act and here they simply do not.

This does not mean, however, that State appointed counsel could not continue their representation and seek Federal relief on an "individual" basis..."

In Michigan v. Long, the Court speaking through Justice O'Connor revisted the question of whether this court should invoke its jurisdiction where there is a question as to whether independent state grounds exist in support of the issue before the court. "If the State court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course will not undertake to review the decision." 103 S.Ct.Rep. at 3476.

Here as evidenced by the aforenoted quote from the Florida Supreme Court's opinion, the resolution that public defenders are without authority to bring civil class action suits in Federal Court, is predicated on the statutory authority provided pursuant to Fla.Stat. 27.51, rather than any limitation to an individual's constitutional right to access to courts.

Sub judice Petitioners instituted a civil proceeding in the United States District Court for the Southern District of Florida by filing a complaint seeking declaratory and injunctive relief. The complaint challenges the constitutionality of certain policies, practices and procedures allegedly employed by the Respondents in providing psychiatric treatment to adolescents. In addition to said petition a Motion for Class Certification, a

memorandum of points and authorities in support of that motion and a Motion for Leave to Proceed in Forma Pauperis was filed in Case No. 80-2294-CIV-EBD.

Prior to the filing of the Federal Civil complaint, Petitioners' client, G.A., had been hospitalized in the Adolescent Unit of the Psychiatric Wing of Jackson Memorial Hospital. G.A. had been initially admitted as a voluntary patient at the request of his mother, R.A. R.A. became dissatisfied with the manner in which her son was being treated and sought to remove him from the hospital. Believing G.A. was to be committed under Florida's Baker Act, Fla.Stat. §934, the hospital officials, sought to have G.A. involuntarily committed. The public defender was appointed to represent G.A. in the commitment proceedings. The commitment proceedings resulted in the issuance of an Order for

Involuntarily Commitment for G.A. Subsequently however, a Petition for Writ of Habeas Corpus was filed in G.A.'s behalf and as a result G.A. was ordered released with the granting of said pleading.

Respondents in the Federal litigation opposed class certification urging that since G.A. had been released from custody the issue was moot. Respondents further sought an order denying G.A.'s request to proceed in forma pauperis and fought to have the public defender disqualified as counsel for G.A. The motion to disqualify was denied, based on the fact that the matter should properly be presented to the State court. The Court also vacated its prior order allowing G.A. to proceed in forma pauperis.

An amended complaint was filed seeking damages.

As observed in Graham v. Vann, 394 So.2d 176, 177 (Fla. 1st DCA 1981) the Office of the Public Defender is a creature of Article V, Section 18 Fla.Const. and has no authority outside that provided by statute. See Office of the Public Defender v. Baker, 371 So.2d 684 (Fla. 4th DCA 1979). The scope of the Florida Public Defender's Office is limited in accordance with the general principles applicable to the powers of any State official. These powers are prescribed by the Constitution or by statute, or both, and are measured by the terms and the necessary implications of the grant and must be executed in the manner directed. This statutory grant of authority which is defined and limited by statute is not unique to Florida. Hayes v. State, 599 P.2d 569 (Wyoming 1979); Alaska Public Defender Agency v. Superior Court, 584 P.2d 1106 (Alaska 1978); Lee v. Superior Court in and for Maricopa County,

472 P.2d 34 (1970); Norton v. State, 40 A.2d 801 (N.J. 1979); and State v. Anonymous, 279 A.2d 574 (Connecticut 1971).

In Florida §27.51(1) Fla.Stat. sets forth the authority from which a public defender obtains authority to act in Florida. The Florida Supreme in State ex rel. Smith v. Brummer, supra, in acknowledging that "The State is constitutionally obligated to respect the professional independence of the public defender whom it engages", further observed as noted in Polk County v. Dobson, 454 U.S. 312 (1981) quoting from Ferri v. Ackerman, 444 U.S. 193, 204, that the public defender's principle responsibility is to serve the undivided interest of his client.

In Florida, a public defender has no authority to institute proceedings in Federal Court other than those set out by

statute. Especially in the instant case where the public defender has sought to institute a civil proceeding in Federal court representing a "class" of individuals all of whom do not fall within the public defender's authority to represent. As observed in Thompson v. Office of the Public Defender, 387 So.2d 541, 543 (Fla. 5th DCA 1980) the Office of the Public Defender in Florida was created as a result of United States Supreme Court cases requiring counsel for all indigent defendants charged with crimes punishable by incarceration. In the instant cause the public defender was responsible for representing G.A. during the involuntary commitment for hospitalization but not to promote a cause celebre in attempting to right the wrongs of the practices of the Psychiatric Unit of Jackson Memorial Hospital. As observed in Branti v. Finkel, _U.S.__ 100 S.Ct. 1287, 1295 (1980), "The primary, if not the only,

responsibility of an assistant public defender is to represent individual citizens in controversy with the state." Clearly a public defender does not owe any responsibility to persons other than those who he is appointed to represent. He is not authorized by statute to undertake representation of any such additional persons, especially when the "suspect class" has not been certified. More importantly there has been no showing that all members of the class are qualified to be represented by the Public Defender's Office in Florida. See §27.51(2) Fla.Stat.

Moreover, the writ should not be issued in the instant cause because the issue is moot. Petitioners acknowledge in Footnote 7 of their petition, p.13 that G.A. was eventually released from Jackson Memorial Hospital on a Writ of Habeas Corpus. They argue therein that the

issue is not moot for two reasons. First, because the State of Florida "still remains free to bring another commitment proceeding against G.A."; and second, even if the matter is moot with respect to G.A. other members of the class pursuant to Sosna v. Iowa, 419 U.S. 393 (1975) and Gerstein v. Pugh, 420 U.S. 103 (1975) continue to "present a live controversy which outlasted the mootness of the main representative's claim". Respondents would disagree and submit first that no certification of a class ever obtained in the instant cause and the fact that the public defender was denied the ability to continue the class action did not and would not eliminate the ability of those unnamed class members to obtain class certification. Secondly, the matter is moot as to G.A. the only recognized client of Petitioners in that alternative available state remedies were utilized by Petitioners to obtain G.A.'s

release. The fact that future proceedings may commence against G.A. for commitment by the State is too remote to deny mootness in light of the facts and circumstances which could develop pertaining to future commitment.

Moreover, Fla.Stat. §27.51(1) clearly contemplates only representation continue in situations in which a case is pending and the result of that case will have a direct impact on the public defender's client. No such showing has been made nor can be made. Likewise, the public defender is not authorized to represent any person in any proceeding without a specific appointment regarding that proceeding. Once G.A. was released from the commitment confinement the public defender's responsiblity for G.A. terminated. Reappointment would have to occur on any future efforts by the State to

recommit G.A. to involuntary hospitalization.

Further, Respondent challenged Petitioners' standing to assert the Sixth and Fourteenth Amendment rights of G.A. and all other indigents. Although cognizant of decisions in Craig v. Boran, 429 U.S. 190 (1976) and Eisenstaldt v. Baird, 405 U.S. 438 (1972), Respondents would urge that the decision in United States v. Raines, 362 U.S. 17, 21 (1960) controls. See also Craig v. Boran, 429 U.S. at 196 Footnote 4.

Assuming for the moment that this Court rejects each of Respondents' previous reasons for denying the writ, a cursory review of the grounds upon which Petitioners' allege relief should be granted equally evidences no merit to the claims presented. Condensed Petitioners argue that the Florida Supreme Court decision to

prohibit public defenders from filing class action suits violates the right to counsel guaranteed by the Sixth and Fourteenth Amendments requiring counsel to be independent of State control. Citing to Polk County v. Dobson, supra, Petitioners argue that the Supreme Court's decision fails to acknowledge the independent nature of the Public Defender's Office in prosecuting clients' case and therefore inherent in prohibiting class action suits denies the independence required under Polk County v. Dobson, supra. Such a result is erroneous. The Florida Supreme Court recognized the independence a public defender must possess in representing their client but specifically highlighted that representation belongs to the public defender's client.

The Florida Supreme Court acknowledged the need for independency of thought in carrying out the Canons of Professional

Responsibility in behalf of a public defender's client, however concluded that serving one's client did not extend to asserting class actions where the class was not common and no authority existed statutorily to permit the public defender to extend its jurisdiction beyond an appointed client. Indeed sub judice, the proper clients of a Public Defender's Office, indigents, are cheated when the Public Defender's Office seeks to represent those individuals either not indigent or not properly appointed. While the right to counsel means the right to an attorney who is independent of tactical control by the State, that right does not mean many should suffer because the public defender determines based on "tactical choices" they should extend themselves to represent a nebulous class or even noteworthy cause.

Beyond saying it's so, Petitioners

failed to demonstrate how "the decision of the Florida Supreme Court conflicts with the decisions of this court construing the right to counsel secure for indigents under the Sixth and Fourteenth Amendments because it does not respect and preserve from State control the independent professional judgment of the public defender". Clearly the public defender was able to defend G.A. sub judice by filing a Petition for Writ of Habeas Corpus in State court which resulted in G.A.'s immediate release from the involuntary commitment. Moreover, as noted by the Florida Supreme Court in its decision there is no bar as suggested by amicus curiae for Petitioners that "the denial to the public defenders of the right to seek available and proper Federal remedies will inevitably result in the deprivation to their clients of effective remedies available to litigants who have private counsel either retained or appointed to represent

them". Further, it is interesting to note sub judice that when the Federal complaint was amended seeking money damages G.A. and his mother, R.A., and the undefined class were represented by private counsel, Mr. Eugene Zenobi.

Citing to Bounds v. Smith, 430 U.S. 817 (1977) and Wolff v. McDonnell, 418 U.S. 539 (1974) Petitioners' argue:

> "...To allow the State to define by statute the persons the public defender must represent to limit by appropriations the resources he has available to conduct his representation, to restrict by writ the legal tactics he may use in representing his client, affords too much power to the State. It threatens to place an intolerable obstacle in the path of indigents seeking meaningful access to the courts through an effective independent.
>
> In essence, Petitioners argue the elimination of the ability to file a Federal civil rights class action totally emasculates their ability to represent clients pursuant to their

> ethical responsibilities. While it may be true the Federal Courts look with favor and recognize the special importance of class actions in civil rights cases, G.A. was the only client the Public Defender's Office was appointed to represent. Individually, he did not represent a class nor was a class certified sub judice. Relief was obtained for G.A. but without having to proceed with a class action suit. Clearly G.A.'s right to access to the courts were not impaired. Nor does the instant case present a circumstance that class representation makes it easier to bring claims on behalf of large numbers of indigents which would otherwise be too expensive to bring on an 'individual' basis."

Lastly, Petitioners argue that there is a greater issue involved that "this case is of fundamental importance because all Florida Public Defenders are now prohibited from filing class action suits on behalf of their clients". While it is true that the Florida Supreme Court in State ex rel. Smith v. Brummer concluded the public defender had no statutory authority to file and represent individuals in Federal

civil class action suits, Petitioners remedy lies with the State Legislature's enacting legislation to expand the public defender's authority, rather than this Court's reviewing a strictly state law question. See Office of Public Defender v. Baker, 371 So.2d 684 (Fla. 4th DCA 1979) wherein the Office of the Public Defender challenged the right of the Circuit Court to appoint the Public Defender's Office to represent a juvenile in a dependency matter. The court observed:

> "...Section 27.51 Fla.Stat. (1977) defining the duties of Public Defender remains in effect. There is nothing in this statute giving the Public Defender the duty to represent a child alleged to be dependent. There is nothing in Chap. 39 or in Chap. 27 giving the Circuit Court the power to appoint the Public Defender in such cases. We hasten to point out that this decision deals soley with the public defender's statutory duty to represent. We are not here faced with the question of the constitutional right of counsel of either the child or the parents.

The Petition for Writ of

Prohibition is granted. The order appointing the Public Defender is vacated."

371 So.2d at 686.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

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No. 82-1989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE HONORABLE BENNETT H. BRUMMER,
Public Defender of the
Eleventh Judicial Circuit of Florida, et al,

Petitioners,

vs.

STATE OF FLORIDA, ex rel. JIM SMITH,
Attorney General of the
State of Florida, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation comprised of more than two thousand lawyers, judges and law professors whose livelihood brings them into daily contact with the criminal justice system.

The Florida Public Defenders Association (FPDA) is a non-profit Florida corporation comprised of the Public Defenders from the twenty judicial circuits of Florida and their assistants who are charged under the State Constitution and law with the responsibility of providing representation under court appointment to indigent criminal defendants in the State of Florida.

National Legal Aid and Defender

Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The membership of NLADA also includes two thousand individual members, most of whom are private practitioners.

In their endeavor to assure effective legal services to the poor, the amicus parties also defend against governmental attempts to infringe upon constitutional guarantees, particularly those affecting due process and effective assistance of counsel which are in issue in this case.

Written consent of both parties to the filing of this amicus brief is lodged with the Clerk.

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SUMMARY OF THE ARGUMENT

The issues presented by petitioners involve the Sixth and Fourteenth Amendments to the Constitution of the United States. At issue is state interference with the exercise of independent legal judgment by a court-appointed legal counsel on behalf of his clients. The Florida Supreme Court in this case has prevented Florida Public Defenders from invoking the jurisdiction of a federal district court for a class action remedy in a case where the Public Defender has been appointed by the state court to represent the named plaintiff.

The federal district judge in this case denied a motion by respondents which sought to disqualify the Public

Defender as counsel in the federal forum (Petitioners' Appendix - A65-72). The district judge also ruled "that the claims for injunctive relief met the requirements for class action certification under Federal Rule of Civil Procedure 23(b)(2)."

The decision below which held that the state Public Defenders, when appointed to represent the named client, cannot invoke the jurisdiction of federal district courts for employment of a class action remedy raises significant and important federal constitutional questions which amicus curiae urge the Court to review in this case:

(a) Whether the state's interference with the independence of counsel and the exercise of independent

professional judgment infringes upon the right to counsel guaranteed by the Sixth Amendment,

(b) Whether the limitation on the authority of the Public Defenders from seeking certain federal remedies, which limitation does not apply to other appointed counsel for insolvent persons, creates an arbitrary and invidious distinction in violation of the due process and equal protection clauses of the Fourteenth Amendment,

(c) Whether injection of the state authority in the attorney-client relationship of Public Defenders and their clients violates the Sixth and Fourteenth Amendments by violating the Code of Professional Responsibility, D.R. 5-107(B), mandating that an attorney exercise independent judgment

on behalf of a client when employed by another in rendering such services,

(d) Whether the conflict between the state and federal courts concerning the authority of the Public Defenders to seek certain federal remedies for their clients violates the due process clause of the Fourteenth Amendment by attempting to place state restraints upon access to the federal courts.

The issues before the Court in this case are of the utmost importance to the equal administration of justice. Amicus curiae urge the grant of a writ of certiorari because the ruling below will cause certain and irremediable harm to the constitutional rights of innumerable persons who are and will be clients of the Florida Public Defenders.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE RIGHT OF INSOLVENT PERSONS TO EFFECTIVE COUNSEL ACTING INDEPENDENT OF STATE CONTROL OVER THE EXERCISE OF PROFESSIONAL JUDGMENT.

Florida has determined that persons subjected to involuntary commitment proceedings are entitled to constitutional protections:

> Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions.

Shuman v. State, 358 So.2d 1333 (Fla. 1978) at 1335, citing to Humphrey v. Cady, 405 U.S. 504 (1972).

In view of Florida's equation of the rights of indigent mental patients and criminal defendants to access to the courts, the interference by the

state with the independence of counsel to seek a proper remedy for his clients is a violation of the Sixth Amendment right to counsel under the United States Constitution. The decision below creates a significant question of whether a state can, consistent with the Sixth Amendment, limit counsel from seeking some remedies that are available to his client. By singling out the class action injunctive remedy as one which the Public Defender cannot seek for his client, the Florida Supreme Court has prevented counsel from seeking the remedy which would most effectively secure the rights of his clients.

The decision below violates the duty of the state to respect the professional independence of the counsel

it employs to represent insolvent persons. See Polk County v. Dodson, 454 U.S. 312 (1981), at 321-322, that:

> [I]t is the constitutional obligation of the State to respect the professional independence of the Public Defenders whom it engages.

The decision below directly conflicts with Dodson. The Florida Supreme Court ruled that the professional judgment of the Public Defender was "of no import" because the Public Defender "must still have the authority to act and here they simply do not." (Petitioners' Appendix - A3-4). Nothing could be more at odds with this Court's decision in Polk County v. Dodson, supra, where it was stated that once appointed the Public Defenders perform essentially a private function "for which state office and

authority are not needed." Id. at 319.

B. THE LIMITATION PLACED BY THE DECISION BELOW ON THE PUBLIC DEFENDERS CREATES AN ARBITRARY DISTINCTION VIOLATIVE OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

Solely because the Public Defender was appointed by the state court, the insolvent client has been deprived by the decision below of the aid of his appointed counsel in seeking the most effective judicial remedy available under the circumstances. Since Florida has a dual system of providing counsel for insolvent persons who face a threatened deprivation of liberty, an artificial distinction between the authority of the Public Defender vis a vis the authority of appointed private counsel creates a second class of persons whose rights cannot be fully

vindicated. Florida has a dual system for providing counsel to insolvent persons:

> It is clear that Chapter 27.50, Florida Statutes (1977), does not impose an exclusive statutory duty on the public defender to represent all insolvent defenders in all criminal proceedings. The statute, in fact, creates a dual system for delivering defense services to the insolvent poor in criminal cases. The public defender may be appointed by the court to represent an insolvent defendant in felony cases and in certain misdemeanor, municipal or county ordinance, and juvenile delinquency cases. If so appointed, it becomes the public defender's duty to represent such defendant. The court also has the option of appointing a member of the Florida Bar in good standing to represent an insolvent defendant in a criminal proceeding pursuant to either Section 27.53(2) or 27.53(3), Florida Statutes (1957).

Dade County v. Baker, 362 So.2d 151 (Fla. 3d DCA 1978), opinion of Hubbart, J., adopted in Escambia County v. Behr, 384 So.2d 147 (Fla. 1980).

The denial to the Public Defenders of the right to seek available and proper federal remedies will inevitably result in the deprivation to their clients of effective remedies available to litigants who have private counsel either retained or appointed to represent them.

This kind of distinction, having no rational basis nor compelling state interest to justify it, implicates the due process and equal protection clauses of the Fourteenth Amendment in a way deserving of the attention of this Court. See Griffin v. Illinois, 351 U.S. 12 (1956), (equal justice

cannot depend on the amount of money one has.)

The distinction between the authority of privately retained as opposed to court-appointed counsel is clearly an invidious discrimination. Additionally, the distinction between the authority of appointed private counsel versus the Public Defenders creates a new and novel discrimination no less at odds with the guarantees of the Fourteenth Amendment. There is a compelling need for this Court to pass upon this question because the ongoing limitation will affect the kind of representation available to over 50,000 persons represented statewide by the Florida Public Defenders. Distinctions between appointed and retained counsel have repeatedly been rejected by this Court. E.g. Polk County v. Dodson, supra, at 318-319.

C. THE INTERFERENCE WITH THE AUTHORITY OF THE PUBLIC DEFENDERS TO EXERCISE INDEPENDENT JUDGMENT IN REPRESENTING THEIR CLIENTS CONFLICTS WITH THE LAWYERS' ROLE UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY.

Florida has recognized that the responsibility of a lawyer may in some cases require seeking federal relief on behalf of his clients.

> Clearly, the State of Florida has no obligation to provide counsel or costs in federal proceedings. This state only has an obligation to provide counsel for indigent defendants in its state courts. Neither this court nor an individual judge in the state system could appoint counsel to represent an indigent in the federal court system. Ross v. Moffitt specifically holds that there is no right of free counsel from the state for an appeal to the United States Supreme Court. This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief. Their professional responsibility may dictate this action, but, in our view, a state court could

not mandate this action.

Graham v. State, 372 So.2d 1363, 1365 (Fla. 1979).

The Public Defender must, in order to render legal services in compliance with ethical considerations, be free to exercise independent judgment. The Public Defenders are ethically bound to oppose any effort restricting their professional independence. Florida has adopted the Code of Professional Responsibility which requires the following in D.R. 5-107(b):

> (B) A lawyer shall not permit a person who ... pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

A Public Defender must be unfettered to represent his clients as completely as does private counsel in matters related to the purpose of the

representation.

The decision below establishes a different range of professional activity and ethical standards for court-appointed counsel. This is a compelling case for issuance of a Writ of Certiorari.

D. THE CONFLICT AND TENSION CREATED BY THE DECISION BELOW BETWEEN STATE AND FEDERAL COURTS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND NECESSITATES RESOLUTION BY THE SUPREME COURT.

The Florida Supreme Court decision directly conflicts with the ruling of the federal district judge who denied a motion by respondents to disqualify the Public Defender as counsel. The federal court found the claims proper for class action injunctive relief:

> The Court finds that the claims for injunctive relief are sufficient to meet the requirements of 23(b)(2).

(Petitioner's Appendix - A72). The federal court deferred ruling, pending further argument and proof, on the adequacy of class representation. (A 71-72).

The conflict between the federal and state courts created by the decision below interferes with the authority of the federal courts to govern practice and procedures in the federal courts. See American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), where it states that the principle of class action procedure is efficiency and economy of litigation. Florida's dual system of providing counsel to insolvent persons will permit some persons to file for a class action remedy. The limitation placed on the Public Defenders will conflict with the

purpose of Federal Rule 23 in avoiding unnecessary multiplicity of actions. The attempt by the Florida Supreme Court to regulate the remedy which Public Defender counsel can seek for their clients in federal court invades the authority of the federal courts to regulate practice and procedure in the federal courts.

The record in the present case is uncontroversible and specific proof that the Supreme Court of Florida has used its power to interfere in matters of federal jurisdiction.

This controversy is of such significance, and without other adequate form of resolution, that the Supreme Court should issue the writ of certiorari to decide whether this kind of limitation is in derogation of the

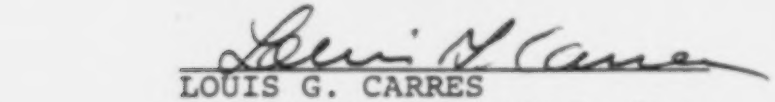
due process clause of the Fourteenth Amendment by placing a state restraint upon access to the federal courts for a proper and effective remedy in matters falling within the jurisdiction of the federal courts.

CONCLUSION

Wherefore, the amicus curiae parties respectfully submit that these issues are of critical and urgent importance to the fair and equal administration of justice, that there is a compelling need for prompt resolution of this controversy, and the Court should issue a Writ of Certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



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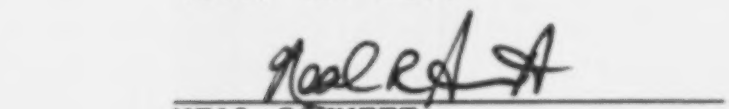

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CERTIFICATE OF SERVICE

I, NEAL SONNETT, do hereby certify that service of three (3) true copies hereof has been made upon all parties required to be served, by depositing same in the U.S. Mail, postage prepaid, addressed to:

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this 12 day of ~~June~~ July, 1983.

Neal A Sonnett

NEAL SONNETT